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Supreme Court, U.S.
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In The

Supreme Court of the United States

PATRICK YOUNGS,

Petitioner,

v.

INDUSTRIAL CLAIM APPEALS OFFICE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Colorado Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When this Court has held that suits regarding workplace injuries involve private rights and that such suits are reserved to Article III courts, has Colorado, which follows federal law regarding separation of powers, violated this Court's rulings by requiring litigation of workplace injuries to take place in the executive branch?

2. In Colorado, which follows federal law regarding equal protection, is there a rational basis for depriving workers' compensation litigants of judicial branch judges when all other injured parties and litigants in Colorado have their cases heard in the judicial branch?

3. When Colorado's judicial branch politically opposes a bill that would place the state's workers' compensation judges in the judicial branch, in addition to other actions aimed at keeping workers' compensation judges out of the judicial branch, and then a case is heard in Colorado's judicial branch wherein a party alleges that the federal and state constitutions require that the state's workers' compensation judges be in the judicial branch, is a fair and impartial forum provided in Colorado's judicial branch as required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDINGS

A list of all parties to the proceeding in the court whose judgment is subject of the petition is as follows:

Claimant-Appellant and Petitioner: Patrick Youngs

Respondents-Appellees and Respondents: Industrial Claim Appeals Office, White Moving & Storage and Pinnacol Assurance

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PETITION FOR A WRIT OF CERTIORARI

Patrick Youngs respectfully petitions for a writ of certiorari to review the opinion of the Colorado Court of Appeals which was denied certiorari by the Colorado Supreme Court.

OPINIONS BELOW

The panel opinion of the Colorado Court of Appeals is reproduced at App. 1-28.

The order of the Industrial Claim Appeals Office in W.C. 4-648-693 affirming the order of the Office of Administrative Courts is reproduced at App. 29-43.

The order of the Office of Administrative Courts in W.C. 4-648-693 is reproduced at App. 44-63.

The en banc opinion of the Colorado Supreme Court denying certiorari is reproduced at App. 68.

JURISDICTION

The judgment of the Colorado Court of Appeals sought to be reviewed was entered on November 19, 2009. A petition for rehearing was denied on February 18, 2010. The order denying certiorari by the Colorado Supreme Court was entered on May 24, 2010. This petition is timely under 28 U.S.C. § 2101(c), 28 U.S.C. § 2104 and Supreme Court Rule 13.1 because it is being filed within 90 days after the

denial of certiorari by the Colorado Supreme Court. This Court has jurisdiction to review the state court judgment from Colorado pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant statutory provision at issue is Colo. Rev. Stat. § 8-43-201 (2009), which states as follows:

> The director and administrative law judges employed by the office of administrative courts in the department of personnel shall have original jurisdiction to hear and decide all matters arising under articles 40 to 47 of this title; except that the following principles shall apply: A claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer; a workers' compensation case shall be decided on its merits; and a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification.

Youngs alleges that the above statute violates the separation of powers doctrine which has its basis in

Article III of the United States Constitution, which provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Colorado follows federal law regarding the separation of powers and also has its own constitutional provision, Article III, setting forth the separation of powers as follows:

> The powers of the government of this state are divided into three distinct departments, – the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

Another constitutional provision in Colorado that is relevant is § 9 of Article VI, which provides as follows:

> (1) The district courts shall be trial courts of record with general jurisdiction, and shall have original jurisdiction in all civil, probate,

> and criminal cases, except as otherwise provided herein, and shall have such appellate jurisdiction as may be prescribed by law.

§ 20 and § 25 of Article VI of the Colorado Constitution are also relevant and the full text of those provisions is in the appendix.

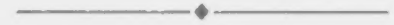
Due process and equal protection are also at issue in this case. The relevant United States Constitution provision is § 1 of Amendment Fourteen, which provides as follows:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant provision of the Colorado Constitution is § 25 of Article II, which provides as follows:

> No person shall be deprived of life, liberty or property, without due process of law.

The following statutes from the Colorado Revised Statutes are involved in this case and are fully set out in the Appendix: Colo. Rev. Stat. §§ 8-1-102, 8-40-102, 8-47-101, 24-30-1001, and 24-30-1003 (2009).



STATEMENT OF THE CASE

This is a workers' compensation case from the state of Colorado. Youngs worked for White Moving & Storage as a driver/mover. While lifting a couch for employer on March 29, 2005, he tore his left bicep tendon. White Moving & Storage and its workers' compensation insurer, Pinnacol Assurance, admitted the injury was work-related.

Youngs underwent multiple surgeries, and a graft from his leg was ultimately used to repair the tear. He was placed at maximum medical improvement for his work injury on May 4, 2006. Due to the limitations from his injury, he failed his commercial driver fitness determination and can no longer work as a commercial driver.

Youngs has a high school education. He graduated 64th out of a class of 65. He took special education classes in high school because the classes taught skills of daily living that he would need. Tests show his math skills are equivalent to a third grader and his reading skills are similar to a freshman in high school.

The treating physician requested a functional capacity evaluation to ultimately determine Youngs' work restrictions, but the evaluation was denied by Pinnacol Assurance. Due to the permanent work restrictions that were available from the injury, an expert determined that Youngs was not able to earn a wage. Youngs applied for a hearing regarding permanent total disability benefits. If he succeeded in his

claim for permanent total disability, he would receive monetary benefits and medical care for his injury for the remainder of his life absent a change in his condition.

As required by Colorado law, Youngs' application for hearing for permanent total disability was filed in the Office of Administrative Courts, which is in the executive branch of Colorado's government. Colo. Rev. Stat. § 8-43-201 (2009). The Office of Administrative Courts is not in the Division of Workers' Compensation, which is a separate executive branch agency. Colo. Rev. Stat. § 8-47-101 (2009); Colo. Rev. Stat. § 24-30-1001 (2009). Judges in the Office of Administrative Courts are hired by the Executive Director of the Department of Personnel. Colo. Rev. Stat. § 24-30-1003 (2009). The judges are not subject to the selection and retention provisions of the Colorado Constitution to which judicial branch judges are subject. Colo. Const. art. VI, §§ 20, 25. The judges in the Office of Administrative Courts are subject to performance reviews. Colo. Rev. Stat. § 24-30-1003(4)(a) (2009).

The Administrative Law Judge (ALJ) denied Youngs' claim for permanent total disability. After the hearing, it became publicly known through news reports that Medical Ops Management, the company through which the Division Independent Medical Evaluation (DIME) was performed, was changing medical records in favor of insurance companies. Youngs moved to strike the DIME and moved for a new hearing. The ALJ refused Youngs' request for

more discovery, allowed Youngs to depose the DIME physician, and then denied Youngs' request for a new hearing.

Youngs appealed to the Industrial Claim Appeals Office (ICAO). The ICAO is another executive branch agency. Colo. Rev. Stat. § 8-1-102 (2009). Among other things, Youngs argued the DIME statutes were not followed and that Youngs did not receive a fair DIME. Youngs also argued that substantial evidence did not support the ALJ's determination regarding work restrictions because the treating physician had requested a functional capacity evaluation to determine the restrictions, but the evaluation was denied by Pinnacol Assurance. The ICAO affirmed the ALJ. Youngs timely filed a notice of appeal with the court of appeals.

At this point Youngs exited the executive branch and entered the judicial branch. Youngs could now raise constitutional issues because neither the ALJ nor the ICAO has jurisdiction over constitutional issues. *Celebrity Custom Builders v. Industrial Claim Appeals Office,* 916 P.2d 539 (Colo. App. 1995).

Youngs challenged the jurisdiction of the executive branch judges based on the separation of powers doctrine and equal protection of the laws citing the Colorado and United States Constitutions. Youngs alleged that the constitutions required that judicial branch judges must hear and determine workers' compensation cases. Youngs cited many federal cases including *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Colorado

follows federal law regarding separation of powers. *Dee Enterprises v. ICAO*, 89 P.3d 430, 435 (Colo. App. 2003). The federal question regarding separation of powers was timely raised at this point in the proceedings.

The Colorado judicial branch, however, has a history of political activism aimed at keeping workers' compensation judges out of the judicial branch. The following history was placed in an affidavit to the court of appeals and accepted as true by the court of appeals.

Legislative transcripts from 1996 document that the judicial branch lobbied against having workers' compensation judges in the judicial branch when a bill before the legislature would have required such judges to be placed in the judicial branch. App. 99-100. The judicial branch representative went on the record at a legislative committee hearing stating, "we don't want the work." App. 100. Although the bill passed through the committee over the objection of the judicial branch, the judicial branch enticed the legislator proposing the bill to restructure the bill so it would drive a fiscal note. The judicial branch knew a fiscal note would kill the bill. The judicial branch used an effective political strategy that worked. App. 100.

In 2001, a legislative task force convened to address civil justice reform. The Director of the Division of Administrative Hearings, which is now called the Office of Administrative Courts, testified

that, "I know the judicial branch has been offered the administrative hearings' function a number of times over the years and they've resisted that." App. 101.

Then a case went through the Colorado appellate courts challenging the jurisdiction of executive branch judges who hear workers' compensation matters. *Dee Enterprises v. ICAO*, 89 P.3d 430 (Colo. App. 2003). The chief justice of the Colorado Supreme Court selected the judges who heard the *Dee Enterprises* case which is shown by the asterisks next to the judges' names in the published opinion. *Dee Enterprises*, 89 P.3d at 441.

The *Dee Enterprises* court ruled the grant of jurisdiction to executive branch judges to hear workers' compensation claims was not unconstitutional. *Dee Enterprises v. ICAO*, *supra*. In doing so, the court relied on federal law, making the issue a federal question. *Id.* The *Dee Enterprises* court ruled workers' compensation proceedings involve public rights. *Id.* at 435-437. This is directly contrary to this Court's holding that workers' compensation proceedings involve private rights. *Crowell v. Benson*, 285 U.S. 22, 51 (1932). Furthermore, because workers could sue employers for injuries at common law, the *Dee Enterprises* opinion is also directly contrary to this Court's holding that actions available at common law must be tried in the judicial branch. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

The above-related facts, among others, were set forth in a motion for disqualification of judges that was filed in this case at the court of appeals. App. 92-112. Youngs requested that the court acknowledge the facts showing the partiality of the judicial branch and invoke the rule of necessity to hear the case. Youngs moved for the disqualification based on Canon 3 of the Colorado Code of Judicial Conduct and Rule 97 of the Colorado Rules of Civil Procedure.

The court of appeals denied the motion and stated, "*See* Order of February 10, 2009 in appeal 08CA0923." App. 64. Case number 08CA0923 is the *Rosario Aviado v. ICAO* case that is also filed at this Court as case number 10SC54. Judge Casebolt drafted the court of appeals' order in *Aviado* and also issued the denial of the motion for disqualification in this case. *Aviado*, 228 P.3d 177; App. 64. In *Aviado*, the court of appeals accepted the facts put forth as true, yet denied the motion stating:

> The fact, if it is one, that the judicial branch has opposed the transfer of Administrative Law Judges into the judiciary is not a basis to conclude that the judges of this court, including the division now assigned to the case, cannot be impartial.

Rosario Aviado v. ICAO, 10SC54, Petition for Writ of Certiorari, App. 67. The *Aviado* court clarified that it did accept the facts put forth as true. *Rosario Aviado v. ICAO*, 10SC54, Petition for Writ of Certiorari, App. 70.

The court of appeals in this case subsequently issued an opinion wherein it did not mention the motion regarding judicial bias or that it had denied such motion. App. 1-28. The court denied the separation of powers argument, citing the court of appeals' decision in *Aviado v. ICAO*, 228 P.3d 177 (Colo. App. 2009). App. 7-9. *Aviado* defers to the *Dee Enterprises* opinion. *Aviado*, 228 P.3d at 180-81. Because the court below ultimately relied on the *Dee Enterprises* opinion, which includes an in-depth analysis of federal law and a reliance on such law, there is a federal question in this case. *Three Affiliate Tribes v. World Engineering P.C.*, 467 U.S. 138, 152 (1984).

In regard to the equal protection issue, the court ruled on this issue of first impression in Colorado without publishing the opinion. App. 9-10. The court held that the goal of quick and efficient claims resolution was a sufficient rational basis to defeat an equal protection claim. App. 10, 27. Colorado follows federal law regarding equal protection. *Tassain v. People*, 731 P.2d 672, 674 (Colo. 1987). Because Colorado follows federal law, a federal question is raised in this case. *American Trucking Assoc., Inc. v. Smith*, 496 U.S. 167, 177 (1990).

Youngs filed a petition for rehearing, which was denied. App. 66-67. Youngs filed a petition for certiorari with the Colorado Supreme Court. The petition stated there was an appearance of impropriety in this case because the judges in the judicial branch, including the supreme court, are members of the organization that lobbied against having workers'

compensation judges in the judicial branch. The Colorado Supreme Court denied certiorari without addressing the appearance of impropriety. App. 68.

REASONS FOR GRANTING THE PETITION

This Court has ruled that if a state court's judgment is based on an incorrect perception of federal law, it is this Court's practice to vacate the state court's judgment. *Three Affiliate Tribes v. World Engineering P.C.*, 467 U.S. 138, 152 (1984). This is such a case.

Colorado adheres to federal law regarding separation of powers. *Dee Enterprises v. ICAO*, 89 P.3d 430, 435-438 (Colo. App. 2003). Workers' compensation claims involve private rights. *Crowell v. Benson*, 285 U.S. 22, 51 (1932). Because an employee could sue an employer at common law for a work injury, workers' compensation litigants are entitled to a judicial branch judge. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Suits regarding workplace injuries are reserved to the judicial branch. *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 587 (1985). In direct contradiction to the holdings of this Court, Colorado has held in published opinions that workers' compensation suits are appropriately heard in the executive branch. App. 8, 24-26 (referring to *Aviado*, *Dee Enterprises*, *supra*). To preserve the integrity of the opinions of this Court, and to ensure that constitutional

rights are upheld, certiorari should be granted. This is an important federal question.

Colorado follows federal law regarding equal protection. *Tassian v. People,* 731 P.2d 672, 674 (Colo. 1987). If a statute's classification rests on grounds wholly irrelevant to the achievement of the State's objective, it violates equal protection. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 70-71 (1978). Colorado has ruled that the goal of quick and efficient claims resolution is a sufficient rational basis for using executive branch judges. App. 10, 27. Because workers' compensation judges in Colorado only hear and decide cases, however, the placement of the court in the executive branch is wholly irrelevant to the State's objective regarding speedy resolutions. The claims would be resolved just as quickly if the judges were in the judicial branch. Indeed, Colorado creates an additional step involving the ICAO that makes resolution of workers' compensation claims take longer than other cases. Colorado's system for determining workers' compensation claims violates equal protection of the laws. This is an important federal question.

This Court has not issued an opinion regarding the effect of a judicial branch entering the political arena in an attempt to evade duties that are historically and constitutionally delegated to such branch. Does the political agenda of Colorado's judicial branch create a constitutionally intolerable probability of actual bias in violation of the Fourteenth Amendment

of the United States Constitution when a party argues before the branch that it is constitutionally required to do what it has lobbied against? Does the fact that the judges in this case issued a published opinion without disclosing the motion for disqualification or any of the facts supporting it affect the decision regarding bias? This Court needs to address what happens to fairness and impartiality when a judicial branch takes a political turn. This is an important federal question.

A. Colorado relies on federal law regarding separation of powers but issued an opinion contrary to the rulings of this Court.

Colorado relies on federal law regarding separation of powers. *Dee Enterprises v. ICAO*, 89 P.3d 430, 435-437 (Colo. App. 2003). Colorado's reliance on federal law regarding separation of powers is sufficient to support jurisdiction of this Court. *Fitzgerald v. Racing Ass'n of Central Iowa*, 539 U.S. 103, 106 (2003). Colorado ruled that this Court's decision in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985) compelled its result in the *Dee Enterprises* case regarding separation of powers. *Dee Enterprises,* 89 P.3d at 436-437. Because a federal case is compelling the result of the state court, this Court has jurisdiction. *Michigan v. Long*, 463 U.S. 1032, 1044 (1983). Whether a state court correctly applies opinions of this Court is a federal question. *American Trucking Assoc., Inc. v. Smith*, 496 U.S. 167, 177 (1990). Therefore, the separation of powers

issue in this case is a federal question and this Court has jurisdiction to hear the issue.

Workers' compensation proceedings involve private rights. *Crowell v. Benson*, 285 U.S. 22, 51 (1932). In direct contradiction to this Court, Colorado has ruled that workers' compensation matters regard public rights. *Dee Enterprises*, 89 P.3d at 436-437. Suits that arose at common law regarding private rights must be heard before a judicial branch judge. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). In direct contradiction to this Court, Colorado has determined that workers' compensation proceedings, which arose at common law and regard private rights, may be adjudicated by executive branch judges who are not subject to de novo review. *Dee Enterprises,* 89 P.3d at 437. Furthermore, although Colorado ruled that a case by this Court compelled its result that workers' compensation cases can be heard in the executive branch, *Dee Enterprises*, 89 P.3d at 437 (referring to *Thomas*, 473 U.S. 568 (1985)), *Thomas* expressly holds that workers' compensation suits are reserved to Article III courts. *Thomas*, 473 U.S. 568, 587 (1985). This Court needs to correct Colorado's erroneous interpretation of federal law.

A state may distribute its powers as it desires. *Crowell,* 285 U.S. at 295. Article III of the United States Constitution and Article III of the Colorado Constitution are similar and Colorado relies on federal law for a resolution of separation of powers issues. *Dee Enterprises,* 89 P.3d at 435. The similarity

of the constitutional provisions plus the reliance by the state on federal law interpreting the provisions means a federal question is at issue. *Fitzgerald v. Racing Ass'n of Central Iowa*, 539 U.S. 103, 106 (2003) (Supreme Court had jurisdiction where state court noted similarity of equal protection and relied on federal law in interpreting equal protection).

It should be noted, however, that the Colorado Constitution addresses the separation of powers in two separate provisions. Article III of the Colorado Constitution provides that there are three distinct departments and no powers belonging to one can be exercised by either of the others except when the constitution expressly directs or permits. Colo. Const. art. III. Section 9 of Article VI provides that the district court shall be the trial court with general jurisdiction over all civil cases except as otherwise provided in the constitution. Colo. Const. art. VI, § 25. Both provisions provide that any exception to the separation of powers needs to be in the constitution. Nowhere in the Colorado Constitution is there a provision allowing workers' compensation proceedings to be heard in the executive branch. Nevertheless, the Colorado judicial branch has determined that an analysis of federal law allows for workers' compensation proceedings to be heard in the executive branch. *Dee Enterprises*, 89 P.3d at 435-438. The analysis, however, is flawed.

The analysis begins with *Crowell v. Benson*, 285 U.S. 22 (1932). *Crowell* involved a workers' compensation proceeding in maritime jurisdiction. An

executive branch agency determined a worker, Knudsen, was in the employ of Benson at the time of an injury. *Crowell,* 285 U.S. at 37. Using the procedure provided in the Longshoremen's and Harbor Workers' Compensation Act, Benson sought an injunction in federal district court. The district court held a trial de novo and determined Knudsen was not in the employ of Benson at the time of the injury. *Crowell,* 285 U.S. at 37.

The *Crowell* Court determined that workers' compensation proceedings involved private rights as opposed to public rights. *Crowell,* 285 U.S. at 51. The *Crowell* Court determined that the judge did not err in permitting a trial de novo on the issue of employment. *Crowell,* 285 U.S. at 65. Specifically, the Court stated:

> We think that the essential independence of the exercise of the judicial power of the United States, in the enforcement of constitutional rights requires that the federal court should determine such an issue upon its own record and the facts elicited before it.

Crowell, 285 U.S. at 64.

The public vs. private right distinction was again addressed in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). The *Northern Pipeline* Court determined that executive branch bankruptcy judges violated Article III because the jurisdiction of the judges extended to private rights suits that existed at common law that were

included as part of the bankruptcy act. *Northern Pipeline,* 458 U.S. at 84. The Court held that congress cannot withdraw any matter from judicial branch judges if that matter from its nature is subject of a suit at common law. *Northern Pipeline,* 458 U.S. at 67. The Court stated:

> The distinction between public rights and private rights has not been definitively explained in our precedents.[22] Nor is it necessary to do so in the present cases, for it suffices to observe that a matter of public rights must, at a minimum, arise "between the government and others." *Ex parte Bakelite Corp., supra,* at 451.[23] In contrast, "the liability of one individual to another under the law as defined," *Crowell v. Benson, supra,* at 51, is a matter of private rights. Our precedents clearly establish that *only* controversies in the former category may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination. *See Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 450, n. 7 (1977); *Crowell v. Benson, supra,* at 501. *See also* Katz, Federal Legislative Courts, 43 Harv.L.Rev. 894, 917-918 (1930).[24] Private rights disputes, on the other hand, lie at the core of the historically recognized judicial power.

Northern Pipeline, 458 U.S. at 69-70 (emphasis in original, footnotes in original omitted). It was argued that *Crowell* stood for the proposition that Article III

was satisfied as long as some degree of appellate review was provided. The *Northern Pipeline* Court did not agree. The Court stated:

> Our precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law, as well as the nature of the case as it has been shaped at the trial level. The Court responded to a similar suggestion in *Crowell* by stating that to accept such a regime, "would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law."

Northern Pipeline, 458 U.S. at 86, n.39 (citation omitted).

The definitions of public rights and private rights were revised somewhat a few years after *Northern Pipeline*. This Court addressed a statutory scheme under the Environmental Protection Agency in 1985 that allowed litigation between two parties in the executive branch. *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985). Because the statutory scheme did not replace rights that were available at common law, the Court held the *Northern Pipeline* case was not applicable. *Thomas* held that non Article III adjudication was appropriate because

a public right that was statutorily created was at issue even though the statutory right was created between two parties. *Id.*

Colorado determined that the *Thomas* case was persuasive regarding workers' compensation actions being public as opposed to private rights. *Dee Enterprises,* 89 P.3d at 437. *Thomas* did not overrule *Crowell*, however, and in fact the *Thomas* Court maintained the holding in *Crowell* regarding workers' compensation proceedings, but differentiated *Crowell* from the facts at issue in *Thomas*.

> In assessing the degree of judicial involvement required by Article III in this case, we note that the statute considered in *Crowell* is different from FIFRA in significant respects. Most importantly, the statute in *Crowell* displaced a traditional cause of action and affected a pre-existing relationship based on a common-law contract for hire. Thus it clearly fell within the range of matters reserved to Article III courts under the holding of *Northern Pipeline*.

Thomas, 473 U.S. at 587. Therefore, *Thomas* expressly did not overturn the holding in *Crowell* that workers' compensation matters involved private rights that had to be heard in the judicial branch. The contention in the *Dee Enterprises* case that workers' compensation matters involve public rights that can be heard in the executive branch is clearly erroneous. *Dee Enterprises,* 89 P.3d at 437.

Based on the erroneous conclusion that workers' compensation matters involve public rights, *Dee*

Enterprises determined that de novo review by a judicial branch judge was no longer required. *Id.* This is clearly erroneous because workers' compensation involves private rights. *Crowell,* 285 U.S. at 51. Workers' compensation judges are not subject to de novo review in Colorado. Colo. Rev. Stat. §§ 8-43-301, 8-43-308 (2008). Workers' compensation judges in Colorado are subject to performance reviews in the executive branch. Colo. Rev. Stat. § 24-30-1003(4) (2008). Workers' compensation litigants in Colorado are entitled to have a judicial branch judge determine their cases. *Northern Pipeline, supra; Crowell, supra; Thomas, supra.*

Furthermore, it must be noted that a citation by the *Dee Enterprises* court regarding de novo review is not accurate. On page 437 of the *Dee Enterprises* case, the court cites the following: "*cf. Huizar v. Allstate Ins. Co.*, 952 P.2d 342 (Colo. 1998) (de novo review of workers' compensation claims not required)." *Dee Enterprises*, 89 P.3d at 437. The *Huizar* case, however, is not a workers' compensation case. The *Huizar* case regards a trial de novo clause in an uninsured motorist provision of an automobile insurance policy. The case has nothing to do with workers' compensation. *Huizar v. Allstate Ins. Co.*, 952 P.2d 342 (Colo. 1998). A trial de novo clause in an automobile policy is not analogous to a workers' compensation claim.

In 1986, this Court addressed the issue of availability of a procedure without an Article III judge. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986). The *Schor* case involves reparations

proceedings that injured persons may choose to take part in if they were injured by a commodity broker's violation of the Commodity Exchange Act. The proceedings were voluntary and not required. The *Schor* Court held that by electing to proceed before the commission that the parties willingly submitted limited jurisdiction of state law claims as a necessary incident to the adjudication of federal claims. *Id.* It is key to the *Schor* Court's analysis that the parties were not forced into the procedure. *Id.* There is no such election in workers' compensation proceedings in Colorado as the parties are forced to have their cases heard in the executive branch. Colo. Rev. Stat. § 8-43-201 (2009).

Colorado has held that workers' compensation litigants have waived their right to a judicial branch judge because the Workers' Compensation Act states that the parties have expressly surrendered their common law rights. *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002); *Dee Enterprises*, 89 P.3d at 439. It is erroneous, however, to conclude that Youngs waived his right to a judicial branch judge. This Court envisioned a scenario such as the one presented here. In a case regarding sovereign immunity, Justice Scalia, who wrote the opinion for the Court, stated the following:

> Indeed, *Parden*-style waivers are simply unheard of in the context of *other* constitutionally protected privileges. As we said in *Edelman*, "[c]onstructive consent is not a doctrine commonly associated with the

surrender of constitutional rights." 415 U. S., at 673. *For example, imagine if Congress amended the securities laws to provide with unmistakable clarity that anyone committing fraud in connection with the buying or selling of securities in interstate commerce would not be entitled to a jury in any federal criminal prosecution of such fraud. Would persons engaging in securities fraud after the adoption of such an amendment be deemed to have "constructively waived" their constitutionally protected rights to trial by jury in criminal cases? After all, the trading of securities is not so vital an activity that any one person's decision to trade cannot be regarded as a voluntary choice. The answer, of course, is no. The classic description of an effective waiver of a constitutional right is the "intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst*, 304 U. S. 458, 464 (1938). "[C]ourts indulge every reasonable presumption against waiver" of fundamental constitutional rights. *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U. S. 389, 393 (1937). See also *Ohio Bell Telephone Co. v. Public Util. Comm'n of Ohio*, 301 U. S. 292, 307 (1937) (we "do not presume acquiescence in the loss of fundamental rights"). State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected. *Great Northern supra* at 51; *Pennhurst*, 465 U. S., at 98. And in the context of federal sovereign immunity – obviously the closest analogy to the present case – it is well established that waivers are

> not implied. See, e.g., *United States v. King*, 395 U. S. 1, 4 (1969) (describing the "settled propositio[n]" that the United States waiver of sovereign immunity "cannot be implied but must be unequivocally expressed"). We see no reason why the rule should be different with respect to state sovereign immunity.

College Sav. Bank v. Flor. Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666, 681-682 (1999) (emphasis added). Youngs has never expressly waived anything. Youngs' right to a district court trial at common law is equivalent to a criminal defendant's right to a jury trial. Youngs' action at common law would have been a civil action. The legislature cannot take away the right to appear in district court that existed at common law by relabeling the action and placing exclusive jurisdiction of the action in an administrative agency. *Cf. Granfinanciera v. Nordberg*, 492 U.S. 33 (1989) ("Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity." p. 61). Colo. Rev. Stat. § 8-43-201 is unconstitutional because it eliminates Youngs' constitutional right to a trial in district court.

How workers' compensation cases are heard varies from state to state. In 1990 a case was heard in Louisiana where a challenge was made to an executive branch agency that was to determine such cases. *Moore v. Roemer*, 560 So.2d 927 (La.App. 1 Cir. 1990). The court determined that workers' compensation

matters were civil in nature and therefore had to be heard in the district court. *Id.* A similar challenge was made in Colorado, but the Colorado Court of Appeals determined that workers' compensation cases are not civil matters under the Colorado constitution. *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002). The matter was addressed in the *Dee Enterprises* case as well. The *Dee Enterprises* court stated that it was not aware of any intent by the General Assembly to regard workers' compensation matters as civil proceedings. *Dee Enterprises*, 89 P.3d at 439. The statutory language in Colorado, however, is very similar to the statutory language in Louisiana that convinced the Louisiana court that workers' compensation is a civil matter. Colo. Rev. Stat. § 8-43-307(2) is part of the enabling statute allowing the court of the appeals to hear workers' compensation appeals. The statute states as follows:

> All such actions shall have precedence over *any civil cause of a different nature* pending in such court, and the court of appeals shall always be deemed open for the trial thereof, and such actions shall be tried and determined by the court of appeals in the manner provided for *other civil actions*.

Colo. Rev. Stat. § 8-43-307(2) (2009) (emphasis added). Louisiana interpreted "other civil" matters to mean workers' compensation was a civil matter. *Moore v. Roemer*, 560 So.2d 927 (La.App. 1 Cir. 1990). Therefore, Colorado has almost the identical situation

as Louisiana yet the two states determined the matter differently.

Alabama recognizes that workers' compensation cases are filed, "in the circuit court of the county which would have jurisdiction of an action between the same parties arising out of tort." Alabama Code of 1975 § 25-5-88. And some states have jury trials. *See* Tex. Lab. Code Ann. § 410.304. In Wyoming, workers' compensation cases are determined in the executive branch, but a judge wrote a concurring opinion that addressed separation of powers and subsidiary functions of an agency.

> In this instance, if the hearing examiner is part of the Workers' Compensation Division, as the agency, she is acting incidental as subsidiary to the function of the agency (making her recommendations to the agency for agency action as required by W.S. 16-3-112), and the separation of powers provision of the constitution is not violated. However, if the office of hearing examiner is an "agency" within itself, then, since its only function is judicial, and with the hearing examiner's action not being incidental or subsidiary to any other function of the agency, i.e., the hearing examiner, a violation of the separation of powers provision of the constitution would result.

State of Wyoming v. Halstead, 795 P.2d 760, 770-771 (Wyo. 1990) (Justice Rooney specially concurring in part and dissenting in part).

The scenario addressed by Justice Rooney in Wyoming is the current status in Colorado. The Office of Administrative Courts is an agency with solely a judicial function. As Justice Rooney stated, the result is a violation of the separation of powers.

Colo. Rev. Stat. § 8-43-201 (2009) violates separation of powers and is unconstitutional beyond a reasonable doubt. *Crowell, supra; Northern Pipeline, supra; Thomas, supra.* Certiorari should be granted to correct Colorado's erroneous interpretation of this Court's opinions. *Three Affiliate Tribes v. World Engineering P.C.*, 467 U.S. 138, 152 (1984) ("If the state court has proceeded on an incorrect perception of federal law, it has been this Court's practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state law question free of misapprehensions about the scope of federal law.")

B. Youngs has not received equal protection of the laws.

Pursuant to the Fourteenth Amendment of the United States Constitution, no state may deny any person equal protection of the laws. Article II, Section 25 of the Colorado Constitution also guarantees the right to equal protection. *Sigman v. Seafood Ltd. P'ship I,* 817 P.2d 527, 532 (Colo. 1991). Equal protection guarantees assure that people who are similarly situated will receive similar treatment under the law. *Id.* Colorado follows the United States Supreme

Court in construing equal protection under the Colorado Constitution. *Tassian v. People*, 731 P.2d 672, 674 (Colo. 1987). The similarity of the constitutional provisions plus the reliance by the state on federal law interpreting the provisions means a federal question is at issue. *Fitzgerald v. Racing Ass'n of Central Iowa*, 539 U.S. 103, 106 (2003) (Supreme Court had jurisdiction where state court noted similarity of equal protection and relied on federal law in interpreting equal protection).

Colo. Rev. Stat. § 8-43-201 (2009) violates equal protection of the laws because it provides the executive branch the authority to determine workers' compensation matters. All other litigants and injured people in Colorado have their claims determined in the judicial branch where the judges are subject to the selection and retention provisions in Article VI of the Colorado Constitution. Workers' compensation litigants are similarly situated to these other litigants. Colo. Rev. Stat. § 8-43-201 (2009) discriminates against workers' compensation litigants by denying them judges subject to the selection and retention provisions. Judges who hear workers' compensation cases are hired by the Director of the Department of Personnel and are subject to performance reviews in the executive branch. Colo. Rev. Stat. § 24-30-1003 (2009).

No argument is made by Youngs for a heightened standard under equal protection. Therefore, the test is whether there is a rational basis for the statute at

issue. *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-458 (1988); *Tassain*, 731 P.2d at 675.

> The Fourteenth Amendment does not prohibit legislation merely because it is special, or limited in its application to a particular geographical or political subdivision of the state. Rather, the Equal Protection Clause is offended only if the statute's classification "rests on grounds wholly irrelevant to the achievement of the State's objective."

Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 70-71 (1978) (citations omitted). Administrative convenience is not a legitimate governmental purpose. *See Tassian*, 731 P.2d at 676.

The Office of Administrative Courts is a separate agency from the Division of Workers' Compensation in Colorado's executive branch. Colo. Rev. Stat. §§ 8-43-201, 24-30-1001 (2008). The judges in the Office of Administrative Courts work solely as judges. There is no rational basis for this court to be in the executive branch as opposed to the judicial branch.

The Colorado Court of Appeals held that the goal of quick and efficient claims resolution was a sufficient rational basis for having workers' compensation claims determined by executive branch judges. App. 10, 27. The placement of workers' compensation judges in the executive branch, however, is wholly irrelevant to the achievement of the state's objective of the quick and efficient resolution of claims. *See Holt Civic Club*, 439 U.S. at 70-71. If the Office of

Administrative Courts was in the judicial branch it would operate as quickly and effectively as it does in the executive branch. Indeed, the workers' compensation scheme in Colorado takes longer than other actions because the extra appellate step of the ICAO is added. Colo. Rev. Stat. § 8-43-301(8) (2009). Other civil actions in Colorado go straight from district court to the court of appeals. Workers' compensation actions, however, must go through two "courts" before getting to the judicial branch at the court of appeals.

Indeed, if the Colorado Court of Appeals believes that the quick and efficient delivery of benefits is important enough to create a court outside of the judicial branch, then why does the court of appeals not follow the statutory thirty-day time limit to determine workers' compensation cases? The Colorado Court of Appeals is required to hear a workers' compensation case within thirty days after it is at issue. Colo. Rev. Stat. § 8-43-309 (2009). Yet the Colorado Court of Appeals determined such language is only directory and not mandatory. *Aviado*, 228 P.3d 177, 182 (Colo. App. 2009). In other words, the court of appeals determined that the quick and efficient resolution of claims is an important enough reason to create a court outside of the judicial branch but not an important enough reason for the court to comply with the statutory timelines directed at such court. The rulings of the Colorado Court of Appeals are incongruous.

Colorado's placement of workers' compensation judges in the executive branch violates workers' compensation litigants' right to equal protection of the laws.

C. This case has not been heard by a fair and impartial tribunal.

The Due Process Clause in the Fourteenth Amendment to the United States Constitution guarantees a fair and impartial tribunal. *In re Murchison*, 349 U.S. 133, 136 (1955); *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997). Objective standards must be used regarding the recusal. *Caperton v. A.T. Massey*, 556 U.S. ___, 129 S.Ct. 2252, 2263 (2009). The question to be answered is whether there is a constitutionally intolerable probability of actual bias. *Id.*

The following facts, among others, were accepted to be true by the Colorado Court of Appeals in this matter: The Colorado judicial branch 1) publicly opposed a bill that would have placed workers' compensation judges in the judicial branch, 2) convinced the sponsor of the bill to change it so it required a fiscal note which killed the bill in the appropriations committee, 3) resisted other attempts at putting workers' compensation judges in the judicial branch, and 4) selected a panel of judges who heard the issues in a previous case. Although the court of appeals accepted these facts as true, the court denied a motion for disqualification and issued an opinion without revealing in the opinion that any such motion was

ever made. These are not the actions of the fair and impartial forum that is required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The actions of the Colorado judicial branch lead to a conclusion that there is a constitutionally intolerable probability of actual bias in the Colorado judicial branch and the opinion below must be reversed.

> [P]ublic confidence in the judiciary is indispensable to the operation of the rule of law; yet this quality is placed in risk whenever judges step outside the courtroom into the vortex of political activity.

Hobson v. Hansen, 265 F. Supp. 902, 923 (D.D.C. 1967) (Wright, J., dissenting).

> Concern with the entanglement of the judicial and executive power of the United States is no passing phenomenon: The Framers themselves feared consolidation of such authority in the hands of individuals. Madison, quoting Montesquieu, warned that "'were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*.'" The Federalist No. 47, at 303 (Mentor ed. 1961) (emphasis original). Hamilton reiterated that "liberty . . . would have everything to fear from [the judiciary's] union with either of the

> other departments." The Federalist No. 78, at 466; see Note, *Constitutional Infirmities*, 96 Yale L.J. at 1383-84.
>
> The aura of judicial impartiality must be conserved for the judiciary's core function, the resolution of cases or controversies. Because "confidence in the disinterestedness of [its] judicatory functions" is central to the judiciary's effectiveness, judges must remain free of external influences and thereby be allowed to act and be perceived as acting in a neutral and impartial manner. Frankfurter, *Advisory Opinions*, in 1 *Encyclopedia of the Social Sciences* 475, 478 (1930). For this reason, political involvement by judges is severely limited. For this reason, political involvement by judges is severely limited.

Gubiensio-Ortiz v. Kanahele, 857 F.2d 1245, 1262-63 (9th Cir. 1988), *vacated* in *U.S. v. Chavez-Sanchez*, 109 S.Ct. 859 (1989) based on *Mistretta v. U.S.*, 488 U.S. 361 (1989) (sentencing commission in judicial branch does not violate separation of powers), *aff'd in part and rev'd in part, on other grounds*, 871 F.2d 104 (9th Cir. 1989) (per curiam).

The judicial branch is intended to implement the policies that the political branches create. *Premier Elec. Const. Co. v. Nat'l Elec. Contractor's Ass'n, Inc.*, 814 F.2d 358, 375 (7th Cir. 1987). The judicial branch is not to be a political entity but is to refrain from political activity so it can be perceived as fair and impartial. *Id.*; *Gubiensio, supra*.

The phrase used by Colorado's judicial branch in the legislative committee hearing where a bill would have required workers' compensation judges to be in the judicial branch was, "WE don't WANT the work." App. 100 (emphasis added). This is a statement of desire; not a statement of a properly thought out legal conclusion. The other statement in a legislative hearing was, "I know the JUDICIAL BRANCH has been offered the administrative hearings' function a number of times over the years and THEY'VE RESISTED that." App. 101 (emphasis added). The statement shows again that the judicial branch is acting as an organization that is resisting having workers' compensation judges being placed in the judicial branch. This case is different from other cases that have previously come before this Court because this case involves a judicial branch's improper desire. In other words, this case involves the Colorado judicial branch's publicly stated partiality toward keeping workers' compensation judges out of the judicial branch.

The judges in this case did not perceive an appearance of impropriety in the fact that they were members of the Colorado judicial branch, which is the organization that had lobbied against having workers' compensation judges in the judicial branch. App. 64. Evidence of membership in an organization, however, is relevant on the issue of bias. Mere evidence of membership in an organization, even without proof that the person has adopted the organization's tenets, is probative of bias. *U.S. v. Abel*, 469 U.S. 45 (1984) (evidence of membership in prison gang probative

of witness' bias toward defendant). The state of Colorado agrees the membership in an organization is probative of bias. *People v. James*, 117 P.3d 91, 94 (Colo. App. 2004) (evidence regarding gang affiliations admissible to show motive); *People v. Hall*, 107 P.3d 1073, 1077 (Colo. App. 2004) (Citing *U.S. v. Abel*, 469 U.S. 45 (1984)). Therefore, membership in the judicial branch is probative of bias in this instance because the judicial branch lobbied as an organization against workers' compensation judges being in the judicial branch.

The bias issue is a federal question. The court below did not rely on an independent state ground for its failure to recuse. It ruled that there was not an appearance of impropriety, which is simply a more stringent standard than is required by the federal constitution as opposed to a completely independent standard. The merits of a federal question have been reached in this case because a fair and impartial tribunal is constitutionally required. *See Ulster County Court v. Allen*, 442 U.S. 140, 154 (1979) (if state court does not indicate state bar to federal constitutional claim, then this Court does not disrespect the state by entertaining the claim); *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) (Supreme Court will not assume state court decision rests on adequate and independent state grounds); *Florida v. Powell*, ___ U.S. ___, 130 S.Ct. 1195 (2010) (because state court opinion did not indicate clearly and expressly that it was alternatively based on bona fide separate, adequate and independent state grounds, Supreme Court has jurisdiction).

There is a constitutionally intolerable probability of actual bias in the opinion below. If a handgun ban was at issue and the tribunal hearing the issue was the National Rifle Association, there would be a constitutionally intolerable probability of actual bias because the organization hearing the matter favors guns. If segregation was at issue and the tribunal hearing the issue was the Ku Klux Klan, there would be a constitutionally intolerable probability of actual bias because the organization hearing the matter favors white supremacy. Likewise, there is a constitutionally intolerable probability of actual bias in this case because the judges below are part of the organization that has publicly resisted workers' compensation judges being placed in the judicial branch. Furthermore, the judges below did not take actions to distance themselves from the actions of the judicial branch or take any steps to try to reduce the appearance of impropriety. The judges below issued an opinion that makes it look like the motion was never made.

Indeed, the opinion by the court of appeals below appears to be written by the judicial branch as opposed to three independent judges. The court of appeals' use of the word "we" reveals its impropriety. The court stated, "[w]e have already rejected the premise of this argument. *See Aviado*, ___ P.3d at ___." App. 4, 8, and 25. The three judges who heard this case, however, did not hear the *Aviado* case. Court of appeals' panels are not bound by the decisions of other court of appeals' panels. *People v. Thomas*, 195 P.3d 1162, 1164 (Colo. App. 2008). It

appears that the word "we" in the court's opinion refers to the judicial branch as a whole; not the members of the panel who heard this case. What the court is saying is: The judicial branch has already rejected the premise of this argument, and we are part of the judicial branch and we will not rule independently. This is not the opinion of a fair and impartial tribunal that is required by the Due Process Clause of the Fourteenth Amendment. This is the opinion of members of an organization acting as a whole in support of the organization's political agenda.

This Court should vacate the result below and hear this case on the constitutional issues that have been presented. This case has not been determined by a fair and impartial tribunal.

CONCLUSION

For all the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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COLORADO COURT OF APPEALS

Court of Appeals No. 08CA2209
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-648-693

Patrick Youngs,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado, White Moving and Storage, Inc., and Pinnacol Assurance,

Respondents.

ORDER AFFIRMED

Division VI
Opinion by JUDGE HAWTHORNE
Loeb and Lichtenstein, JJ., concur

Opinion Modified and
Petition for Rehearing DENIED

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced November 19, 2009

Chris Forsyth Law Office, LLC, Chris Forsyth, Denver, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Harvey D. Flewelling, Denver, Colorado, for Respondents White Moving & Storage, Inc. and Pinnacol Assurance

OPINION is modified as follows:

Section V currently reads:

V. Constitutional Challenges

Last, claimant raises several constitutional challenges to the workers' compensation system. He argues that by using ALJs the division of workers' compensation violates the separation of powers because ALJs fall under the umbrella of the executive branch rather than the judicial branch. Further, he contends his "fundamental right" to a hearing before a judicial branch officer was violated, and that section 8-43-201, C.R.S. 2009, unconstitutionally permits using executive branch ALJs. He reasons that the system should be analyzed for constitutionality under a strict scrutiny test because workers' compensation claimants comprise a suspect class being deprived of their fundamental right to a hearing before the judicial branch. Finally, he argues that even if a rational basis test is applied, no rational basis exists for depriving claimants of a hearing before a judicial officer. We are not persuaded by these arguments.

A. Standard of Review

Because the Panel and the ALJ lack authority to address constitutional issues, these questions are properly raised for the first time on appeal. *See Dee*

Enters. v. Indus. Claim Appeals Office, 89 P.3d 430, 432 (Colo. 2003). We review constitutional challenges to statutes, including the Workers' Compensation Act (Act), de novo. *Snook v. Joyce Homes, Inc.*, 215 P.3d 1210, 1214 (Colo. App. 2009). We presume that a statute is constitutional until shown otherwise. *Id.* The party challenging a statute's constitutionality "bears the burden of proving its invalidity beyond a reasonable doubt." *Culver v. Ace Elec.*, 971 P.2d 641, 646 (Colo. 1999).

B. Right to a Hearing in the Judicial Branch

Claimant contends that because workers' compensation rights existed at common law, he cannot be deprived of his right to a hearing in the district court before a judicial branch officer. We are not persuaded.

This question was recently addressed by a division of this court in *Aviado v. Indus. Claim Appeals Office*, ___ P.3d ___, ___ (Colo, App. No. 0SCA0923, Apr. 16, 2009). *Aviado* concluded that workers' compensation hearings are not civil actions, and, consequently, a claimant has no "fundamental right" to pursue an action to recover damages for work-related injuries against his or her employer in district court. *See Aviado*, ___ P.3d at ___. It also expressly rejected the contention claimant briefly raises here that the use of ALJs who serve under the executive branch violates the separation of powers.

Aviado and its predecessors, *Dee Enterprises* and *MGM Supply* Co. *v. Industrial Claim Appeals Office,*

62 P.3d 1001 (Colo. App. 2002), thoroughly and thoughtfully analyzed the constitutional questions claimant raises here. We find the analysis contained in *Aviado* persuasive and well reasoned, and find no reason to stray from it, Accordingly, we reject claimant's contention.

C. Waiver of Right to District Court Action

Claimant also contends that a hearing before an ALJ could not proceed because he had not waived his right to a hearing before, the district court.

We have already rejected the premise of this argument *See Aviado*, ___ P.3d at ___. Because it concluded that a claimant has no fundamental right to a district court hearing, the *Aviado* division also rejected the contention that a claimant must waive the right for a court hearing before an ALT may properly proceed. For the reasons articulated in *Aviado,* we reject claimant's contention.

D. Violation of Equal Protection

Claimant contends that his right, and the right of all workers' compensation claimants, to equal protection is violated by section 8-43-201, which imbues the division and ALJs with "original jurisdiction to hear and decide all matters arising" under the Act. He argues that workers' compensation claimants comprise a suspect class and are deprived of their

fundamental right to access to the district courts by section 8-43-201. We disagree.

We note at the outset that Colorado courts have repeatedly held that workers' compensation claimant's are not a suspect class and that workers' compensation benefits are not a fundamental right. *See Dillard v. Indus. Claim Appeals Office,* 134 P.3d 407, 413 (Colo. 2006); *Simpson v. Indus. Claim Appeals Office*, ___ P.3d ___, ___ (Colo. App No. 07CA1581, Apr. 16, 2009); *Kroupa*, 53 P.3d at 1197. In addition, as noted above, workers' compensation claimants do not have a fundamental right to a district court hearing. *See Aviado,* ___ P.3d at ___. Consequently, we apply the rational basis test to claimant's equal protection challenge. *See Dillard*, 134 P.3d at 413.

Under a rational basis test, "the party asserting the statute's unconstitutionality must show that the classification lacks a legitimate governmental purpose and, without a rational basis, arbitrarily singles out a group of persons for disparate treatment in comparison to other persons who are similarly situated." *Id.* Using ALJs employed by the division to hear workers' compensation claims advances the Act's goals of quick and efficient claims resolution. § 8-40-102(1), C.R.S. 2009; *see Simpson*, ___ P.3d at ___; *MGM Supply*, 62 P.3d at 1004. We conclude that advancing these legitimate governmental goals is a sufficient rational basis for using ALJs, and decline to find that section 8-43-201 violates claimant's right to equal protection.

We therefore conclude that claimant has failed to meet his burden of demonstrating that the Act's provision for using ALJs to hear workers' compensation claims is unconstitutional.

That portion of the opinion is deleted, and Section V now reads:

V. Constitutional Challenges

Last, claimant raises several constitutional challenges to the workers' compensation system. He argues that by using ALJs the division of workers' compensation violates the separation of powers because ALJs fall under the umbrella of the executive branch rather than the judicial branch. Further, he contends his "fundamental right" to a hearing before a judicial branch officer was violated, and that section 8-43-201, C.R.S. 2009, unconstitutionally permits using executive branch ALJs, He reasons that the system should be analyzed for constitutionality under a strict scrutiny test because workers' compensation claimants comprise a suspect class being deprived of their fundamental right to a hearing before the judicial branch, and even if a rational basis test is applied, no rational basis exists for depriving claimants of a hearing before a judicial officer. Finally, he contends that "every time a judge determines whether someone has a right to workers' compensation benefits, he or she is making a determination regarding a constitutionally protected property interest" and

therefore, the judge must be in the judicial branch. We are not persuaded by these arguments.

A. Standard of Review

Because the Panel and the ALJ lack authority to address constitutional issues, these questions are properly raised for the first time on appeal. *See Dee Enterprises v. Indus. Claim Appeals Office*, 89 P.3d 430, 432 (Colo. App. 2003). We review constitutional challenges to statutes, including the Workers' Compensation Act (Act), de novo. *Snook v. Joyce Homes, Inc.*, 215 P.3d 1210, 1214 (Colo. App. 2009). We presume that a statute is constitutional until shown otherwise. *Id.* The party challenging a statute's constitutionality "bears the burden of proving its invalidity beyond a reasonable doubt." *Culver v. Ace Elec.*, 971 P.2d 641, 646 (Colo. 1999).

B. Right to a Hearing in the Judicial Branch

Claimant contends that because workers' compensation rights existed at common law, he cannot be deprived of his right to a hearing in the district court before a judicial branch officer. He also asserts in his motion regarding due process and request for evidentiary hearing filed with this court that due process requires such a hearing. We are not persuaded.

This question was recently addressed by a division of this court in *Aviado v. Indus. Claim Appeals Office*, ___ P.3d ___, ___ (Colo. App. No. 08CA0923,

Apr. 16, 2009). *Aviado* concluded that workers' compensation hearings are not civil actions, and, consequently, a claimant has no "fundamental right" to pursue an action to recover damages for work-related injuries against his or her employer in district court. *See Aviado*, ___ P.3d at ___. It also expressly rejected the contention claimant briefly raises here that the use of ALJ's who serve under the executive branch violates the separation of powers.

Aviado and its predecessors, *Dee Enterprises* and *MGM Supply Co. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002), thoroughly and thoughtfully analyzed the constitutional questions claimant raises here. We find the analysis contained in *Aviado* persuasive and well reasoned, and find no reason to stray from it. Accordingly, we reject claimant's contention and deny his motion regarding due process and request for evidentiary hearing.

C. Waiver of Right to District Court Action

Claimant also contends that a hearing before an ALT could not proceed because he had not waived his right to a hearing before the district court.

We have already rejected the premise of this argument. *See Aviado*, ___ P.3d at ___. Because it concluded that a claimant has no fundamental right to a district court hearing, the *Aviado* division also rejected the contention that a claimant must waive the right for a court hearing before an ALJ may

properly proceed. For the reasons articulated in *Aviado,* we reject claimant's contention.

D. Violation of Equal Protection

Claimant contends that his right, and the right of all workers' compensation claimants, to equal protection is violated by section 8-43-201, which imbues the division and ALJs with "original jurisdiction to hear and decide all matters arising" under the Act. He argues that workers' compensation claimants comprise a suspect class and are deprived of their fundamental right to access to the district courts by section 8-43-201. We disagree.

We note at the outset that Colorado courts have repeatedly held that workers' compensation claimants are not a suspect class and that workers' compensation benefits are not a fundamental right. *See Dillard v. Indus. Claim Appeals Office,* 134 P.3d 407, 413 (Colo. 2006); *Simpson v. Indus. Claim Appeals Office,* 219 P.3d 354, 364 (Colo. App. 2009) *(cert. granted sub nom Benchmark/Elite, Inc. v. Simpson,* Nov. 9, 2009); *Kroupa,* 53 P.3d at 1197. In addition, as noted above, workers' compensation claimants do not have a fundamental right to a district court hearing. *See Aviado,* ___ P.3d at ___. Consequently, we apply the rational basis test to claimant's equal protection challenge. *See Dillard,* 134 P.3d at 413.

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purpose and, without a rational basis, arbitrarily singles out a group of persons for disparate treatment in comparison to other persons who are similarly situated." *Id.* Using ALJs employed by the office of administrative courts in the department of personnel to hear workers' compensation claims advances the Act's goals of quick and efficient claims resolution. § 8-40-102(1), C.R.S. 2009; *see Simpson*, 219 P.3d at 363; *MGM Supply*, 62 P.3d at 1004. We conclude that advancing these legitimate governmental goals is a sufficient rational basis for using ALJs, and decline to find that section 8-43-201 violates claimant's right to equal protection.

We therefore conclude that claimant has failed to meet his burden of demonstrating that the Act's provision for using ALJs to hear workers' compensation claims is unconstitutional.

E. Constitutionally Protected Property Interest

Claimant contends that because the receipt of workers' compensation benefits is a constitutionally protected property interest, "a judge who hears and determines workers' compensation benefits must be in the judicial branch." We disagree.

We have noted above that the Panel and the ALJ lack authority to address constitutional issues. *See Dee Enterprises*, 89 P.3d at 432; *also see Celebrity Custom Builders v. Indus. Claim Appeals Office*, 916 P.2d 539, 541 (Colo. App. 1995) (administrative

agencies do not have the authority to pass on constitutionality of statutes or ordinances). However, claimant has not cited any persuasive authority, and our research has yielded none, to support his proposition that every time an ALJ determines a claimant's right to workers' compensation benefits, he or she is addressing a constitutional issue. Therefore, we reject this argument.

In this workers' compensation action, claimant, Patrick Youngs, appeals the final order of the Industrial Claim Appeals Office (the Panel) affirming the decisions of the administrative law judge (ALJ) denying claimant's request seeking discovery from insurer, Pinnacol Assurance, and finding that claimant was not permanently totally disabled. We affirm the Panel's final order.

I. Facts and Procedural History

Claimant worked as a truck driver and mover for employer, White Moving and Storage (with insurer, Pinnacol, collectively referred to as employer). In March 2005, he sustained an admitted, work-related injury to his left arm while moving a couch. Employer referred claimant to an authorized treating physician (ATP), who recommended surgery to repair a torn bicep muscle. However, after the surgery the tear recurred, requiring a second surgery in October 2005. During the second surgery, a graft from claimant's left leg was used to repair the torn bicep.

A functional capacity evaluation (FCE) determined claimant could occasionally lift thirty pounds (floor to waist) and forty pounds (waist to shoulder), and frequently lift twenty pounds (floor to waist) and thirty pounds (waist to shoulder). Shortly thereafter, the ATP placed claimant at maximum medical improvement (MMI), and released him from care with impairment ratings of five percent for the left upper extremity and five percent for the left lower extremity.

Claimant retained a physician to perform an independent medical examination (IME) and also underwent a division-sponsored independent medical examination (DIME). These examinations yielded impairment ratings different from the ATP's. The DIME physician rated the impairment to claimant's left upper extremity at eight percent and to his left lower extremity at three percent. Claimant's IME physician rated his impairment at twelve percent of the upper extremity and five percent of the lower extremity, resulting in a total impairment of nine percent of the whole person. Claimant's IME physician and the ATP agreed, however, that claimant's injuries rendered him unfit to drive a commercial vehicle.

Two vocational rehabilitation specialists similarly reached conflicting conclusions about claimant's employability. Claimant's specialist concluded that claimant's limitations rendered him unemployable. In contrast, employer's retained specialist opined that claimant could work in unskilled positions requiring

only light duty or no use of his left arm. The ATP reviewed the employer's specialist's recommendations and determined that the demands of some suggested vocational opportunities, such as assembler, would not exceed claimant's physical limitations.

After conducting a hearing on claimant's request for permanent total disability benefits, the ALJ determined that claimant was not permanently and totally disabled, but had sustained eight percent and five percent impairment to his left upper and lower extremities, respectively. On review, the Panel affirmed the ALJ's order.

Claimant now appeals.

II. Substantial Evidence

Claimant contends that because the evidence does not support the ALJ's finding that he is not permanently and totally disabled, the matter must be remanded for a new hearing on permanent total disability (PTD). He argues that the work restrictions the ALJ attributes to the ATP were never approved by the ATP. Rather, he contends that the only physician-approved work restrictions contained in the record were those adopted by his retained IME physician. Claimant reasons that because employer's vocational rehabilitation expert, whom the ALJ found credible and persuasive, relied on work restrictions that were not formally adopted by the ATP, the expert's opinion is unsupported. We disagree and conclude that

substantial evidence in the record supports the ALJ's decision.

A claimant is permanently and totally disabled if he or she is "unable to earn any wages in the same or other employment." § 8-40-201(16.5)(a), C.R.S. 2009. The determination whether a claimant is permanently and totally disabled is fact specific and is "made on a case by case basis." *Holly Nursing Care Ctr. v. Indus. Claim Appeals Office,* 992 P.2d 701, 703 (Colo. App. 1999). "[I]n making a PTD determination, the ALJ may consider the effects of the industrial injury in light of the claimant's human factors, including, inter alia, the claimant's age, work history, general physical condition, and prior training and experience." *Joslins Dry Goods Co. v. Indus. Claim Appeals Office,* 21 P.3d 866, 868 (Colo. App. 2001).

The ALJ's factual determinations must be upheld on appeal if supported by substantial evidence in the record. § 8-43-308, C.R.S. 2009; *Christie v. Coors Transp. Co.*, 919 P.2d 857, 860 (Colo. App. 1995), *aff'd*, 933 P.2d 1330 (Colo. 1997); *see City of Northglenn v. Eltrich,* 908 P.2d 139 (Colo. App. 1995) (ALJ's decision may be set aside only if the ALJ's findings are not supported by the evidence), *aff'd sub nom. Price v. Indus. Claim Appeals Office,* 919 P.2d 207 (Colo. 1996). The reviewing court is bound by the ALJ's factual determinations even if the evidence was conflicting and could have supported a contrary result. It is the fact finder's sole province to weigh the evidence and resolve contradictions in the evidence. *Pacesetter Corp. v. Collett*, 33 P.3d 1230, 1234 (Colo.

App. 2001); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 415 (Colo. App. 1995) (reviewing court must defer to the ALJ's credibility determinations and resolution of conflicts in the evidence and may not substitute its judgment for the ALJ's).

Here, the ALJ found the employer's expert's testimony credible and persuasive. The expert testified that claimant was employable and was qualified and able to work in jobs such as unarmed security guard, lobby attendant, or advertising material distributor. In forming his opinion, he relied on the physical restrictions that the ATP described in his deposition: lifting thirty pounds occasionally with both arms, and ten to fifteen pounds "on a moderately frequent basis."

Moreover, even if we disregard the ATP's recommended restrictions, the substantial evidence in the record supports the ALJ's conclusion that claimant is employable and not permanently and totally disabled. Employer's expert testified that claimant would still be able to find gainful employment even under the more restrictive work restrictions expressed by claimant's retained IME physician and functional capacity evaluator. He further testified that some of the employment positions he recommended for claimant have been performed by one-armed workers.

Because substantial evidence in the record supports the ALJ's conclusion that claimant is not permanently and totally disabled, as well as the ALJ's determination that the ATP adequately expressed

work restrictions for claimant, we cannot set aside the ALJ's order on this basis. *See* § 8-43-308, *Christie*, 919 P.2d at 860.

III. Propriety of DIME Report

Next, claimant contends that the DIME report should have been disregarded by the ALJ and a new DIME ordered. In support of this contention he argues that (1) the DIME report was tainted by scandal and by the DIME physician's allegedly inadequate compensation; (2) the ALJ should have allowed more discovery concerning the DIME; and (3) the ALJ gave too much deference to the DIME report. We are not persuaded by these arguments and conclude that the Panel properly upheld the ALJ's decisions concerning the DIME.

A. Facts Pertinent to the DIME

A few weeks after the parties conducted a hearing in this matter, local news media reported that Medical Ops Management (Med Ops), the entity which coordinated the DIME in this case, had engaged in unethical practices. The report alleged that Med Ops had altered physicians' reports or had pressured physicians to alter their reports, to the benefit of insurers.

Claimant took no immediate action to bring the potential conflict to the ALJ's attention following the news report's airing. Instead, after the ALJ had

issued her initial order finding claimant was not permanently and totally disabled, claimant moved for a new hearing and sought to have the DIME report stricken on the ground that it was tainted by Med Ops' involvement. After conducting limited additional discovery, the parties presented oral arguments on the effect, if any, of Med Ops' allegedly dishonest activities, and the effect, if any, a tainted DIME report would have on the ALJ's determination. The ALI denied claimant's requests both to strike the DIME and for a new hearing.

B. Receiving DIME's Full Value

In her deposition, the DIME physician testified that she used Med Ops primarily to schedule DIMEs, obtain medical records, and transcribe reports. She also testified that Med Ops had received $250 to $350 of the $675 DIME fee, diminishing the DIME.

Claimant contends this $250-$350 payment to Med Ops deprived him of the DIME's full benefit because it reduced the DIME physician's fee. Under the workers' compensation rules of procedure, a DIME physician receives $675 for performing a DIME. Dept of Labor & Employment Rule 11-4(A), 7 Code Colo. Regs. 1101-3.

However, Rule 11-4 does not specify that all funds paid for a DIME must inure directly to the physician's benefit and it is silent as to a physician distributing DIME proceeds. Here, the DIME

physician simply paid for services provided her by Med Ops.

More important, the DIME physician testified that her work's quality was unaffected by the amount she was paid. Claimant offers no facts contradicting this testimony and does not demonstrate that the DIME's quality was diminished in any way. Accordingly, we find no reason to set aside the ALJ's ruling based on this contention.

C. Tainted DIME Report

During the deposition, the DIME physician reviewed her DIME report, but was unable to find any changes made to it. She described the report as substantially correct and accurate. Further, while she was could not state with one hundred percent assurance that the report was unaltered, she was "ninety percent" certain it was unchanged and had "no reason to think that it was changed." Nor did she agree that it was "entirely possible" the report had been changed, instead characterizing the possibility that the report had been changed as "unlikely" and "a very small possibility."

Claimant nonetheless contends that the DIME may be tainted and should consequently be stricken and a new DIME conducted. He maintains that he should be assured the DIME is accurate, and that, because there is a risk the report is tainted, however slight, he is entitled to a new DIME and, hence, a new hearing.

However, the record indicates that the DIME physician's reluctance to provide unmitigated assurances of the report's accuracy stemmed from her diminished recollection, rather than from any belief that the report was altered. Acting within her discretion, the ALJ concluded that the DIME physician's assurances of the report's accuracy were adequate and credible. We may not set aside this credibility determination if it is supported by substantial evidence in the record. *See Benuishis v. Indus. Claim Appeals Office*, 135 P.3d 1142, 1144-45 (Colo. App. 2008) (holding that ALJ's factual findings concerning conflict of interest involving a physician were factual questions that could only be set aside if unsupported by substantial evidence in record).

The DIME physician's repeated statements that the report appeared to be her unadulterated work supports the ALJ's credibility determination and conclusion that the DIME was sufficiently reliable and a new DIME was unwarranted. These findings may not be disturbed. *Kroupa v. Indus. Claim Appeals Office*, 53 P. 3d 1192, 1197 (Colo. App. 2002) ("It is for the ALJ to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence. Like the Panel, we must uphold the ALJ's determination of factual issues if it is supported by substantial evidence in the record.").

Claimant also argues that the DIME report was essentially tainted "per se" because the DIME physician violated of Rule 11-2(K), which provides that a DIME physician may "not engage in communication regarding the IME with any person other than Division staff." Dep't of Labor & Employment Rule 11-2(K), 7 Code Colo. Regs. 1101-3. He argues that because the DIME report was transcribed by Med Ops personnel, and not by the DIME physician, the rule was violated and the DIME was tainted.

However, we find no violation of Rule 11-2(K) here. In our view, the rule prohibits improper communication regarding the DIME's findings or a physician's opinions, but does not bar requests for transcription between a physician and staff. Claimant provides no authority, and we are aware of none, supporting this proposition. Under claimant's reasoning, a physician would be required to transcribe his or her own report, or risk violating Rule 11-2(K). The DIME physician's testimony indicates that Med Ops served as an extension of the DIME physician's offices. Consequently, her request for transcription by Med Ops was not a communication violating the rule, and imbued no taint on the DIME report.

We therefore affirm the Panel's order concerning this issue.

D. Deference to the DIME

Claimant also contends that the ALJ gave "too much" deference to the DIME report. He argues that

the ALJ's supplemental order simply deleted an erroneously stated burden of proof. Consequently, he claims, it is "transparent" that the ALJ "gave too much deference" to the DIME physician. We disagree.

A review of the ALJ's original and supplemental orders belies claimant's contention. In the supplemental order, not only did the ALJ delete the erroneous reference to the burden of proof, but she also changed the impairment rating for claimant's left lower extremity from three percent of the whole person, as found by the DIME physician, to five percent of the whole person, as determined by the ATP. Thus, the ALJ expressly rejected portions of the DIME report in her supplemental order. Therefore, we conclude that the record does not support claimant's contention that the ALJ gave the DIME report "too much deference."

IV. Request for Additional Discovery

Claimant next contends that the ALJ abused her discretion by barring his proposed interrogatories to employer and insurer. We are not persuaded.

An ALJ's discovery decisions must be upheld unless an abuse of discretion occurred. *See Shafer Commercial Seating, Inc. v. Indus. Claim Appeals Office*, 85 P.3d 619, 621 (Colo. App. 2003) (ALJ may rule on discovery matters and impose sanctions; decisions "[w]hether to impose sanctions and the nature of the sanctions to be imposed are matters within the fact finder's discretion"). An abuse of

discretion occurs when an ALJ's decision "'exceeds the bounds of reason,'" which may be determined by considering "whether an award is supported by the applicable law." *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850, 856 (Colo. 1993) (quoting *Rosenberg v. Bd. of Educ.*, 710 P.2d 1095, 1098-99 (Colo. 1985)).

Here, claimant had served discovery requests on employer, seeking to elicit information about employer's and insurer's involvement with Med Ops to show that Med Ops had "the incentive to change reports on a regular basis" and was "essentially subsidized" by insurer. We have already upheld the ALJ's finding that the DIME report was not tainted by Med Ops' allegedly questionable practices. Without any evidence suggesting that the DIME report had been altered, evidence that Med Ops may have had incentive to change reports was irrelevant. Consequently, there was no reasonable basis to permit claimant to propound additional written discovery requests to employer and insurer.

Moreover, claimant was granted the opportunity to depose the DIME physician. She denied any improprieties in her own dealings with Med Ops, and, as noted above, found no inaccuracies in her report. By so testifying, the DIME physician effectively dispelled the likelihood that the report was tainted, and rendered claimant's proposed written discovery irrelevant. We therefore conclude that the ALJ did not abuse her discretion by barring claimant's requests for additional discovery.

We also reject claimant's contention that the unavailability of the prehearing conference tape and transcript requires us to reach a different conclusion. The record adequately establishes that no abuse of discretion occurred in denying the discovery request, and claimant has offered no insight into what additional facts could have been gleaned from the prehearing conference that would have favored allowing the additional discovery.

V. Constitutional Challenges

Last, claimant raises several constitutional challenges to the workers' compensation system. He argues that by using ALJs the division of workers' compensation violates the separation of powers because ALJs fall under the umbrella of the executive branch rather than the judicial branch. Further, he contends his "fundamental right" to a hearing before a judicial branch officer was violated, and that section 8-43-201, C.R.S. 2009, unconstitutionally permits using executive branch ALJs. He reasons that the system should be analyzed for constitutionality under a strict scrutiny test because workers' compensation claimants comprise a suspect class being deprived of their fundamental right to a hearing before the judicial branch, and even if a rational basis test is applied, no rational basis exists for depriving claimants of a hearing before a judicial officer. Finally, he contends that "every time a judge determines whether someone has a right to workers' compensation benefits, he or she is making a determination

regarding a constitutionally protected property interest" and therefore, the judge must be in the judicial branch. We are riot persuaded by these arguments.

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Claimant contends that because workers' compensation rights existed at common law, he cannot be deprived of his right to a hearing in the district court before a judicial branch officer. He also asserts in his motion regarding due process and request for evidentiary hearing filed with this court that due process requires such a hearing. We are not persuaded.

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Aviado and its predecessors, *Dee Enterprises* and *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002), thoroughly and thoughtfully analyzed the constitutional questions claimant raises here. We find the analysis contained in *Aviado* persuasive and well reasoned, and find no reason to stray from it. Accordingly, we reject claimant's contention and deny his motion regarding due process and request for evidentiary hearing.

C. Waiver of Right to District Court Action

Claimant also contends that a hearing before an ALJ could not proceed because he had not waived his right to a hearing before the district court.

We have already rejected the premise of this argument. *See Aviado*, ___ P.3d at ___. Because it concluded that a claimant has no fundamental right to a district court hearing, the *Aviado* division also

rejected the contention that a claimant must waive the right for a court hearing before an ALJ may properly proceed. For the reasons articulated in *Aviado,* we reject claimant's contention.

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Claimant contends that his right, and the right of all workers' compensation claimants, to equal protection is violated by section 8-43-201, which imbues the division and ALJs with "original jurisdiction to hear and decide all matters arising" under the Act. He argues that workers' compensation claimants comprise a suspect class and are deprived of their fundamental right to access to the district courts by section 8-43201. We disagree.

We note at the outset that Colorado courts have repeatedly held that workers' compensation claimants are not a suspect class and that workers' compensation benefits are not a fundamental right. *See Dillard v. Indus. Claim Appeals Office*, 134 P.3d 407, 413 (Colo. 2006); *Simpson v. Indus. Claim Appeals Office*, 219 P.3d 354, 364 (Colo. App. 2009) (*cert. granted sub nom. Benchmark/Elite, Inc. v. Simpson,* Nov. 9, 2009); *Kroupa,* 53 P.3d at 1197. In addition, as noted above, workers' compensation claimants do not have a fundamental right to a district court hearing. *See Aviado*, ___ P.3d at ___. Consequently, we apply the rational basis test to claimant's equal protection challenge. *See Dillard,* 134 P.3d at 413.

Under a rational basis test, "the party asserting the statute's unconstitutionality must show that the classification, lacks a legitimate governmental purpose and, without a rational basis, arbitrarily singles out a group of persons for disparate treatment in comparison to other persons who are similarly situated." *Id.* Using ALJs employed by the office of administrative courts in the department of personnel to hear workers' compensation claims advances the Act's goals of quick and efficient claims resolution. § 8-40-102(1), C.R.S. 2009; *see Simpson*, 219 P.3d at 363; *MGM Supply*, 62 P.3d at 1004. We conclude that advancing these legitimate governmental goals is a sufficient rational basis for using ALJs, and decline to find that section 8-43-201 violates claimant's right to equal protection.

We therefore conclude that claimant has failed to meet his burden of demonstrating that the Act's provision for using ALJs to hear workers' compensation claims is unconstitutional.

E. Constitutionally Protected Property Interest

Claimant contends that because the receipt of workers' compensation benefits is a constitutionally protected property interest, "a judge who hears and determines workers' compensation benefits must be in the judicial branch." We disagree.

We have noted above that the Panel and the ALJ lack authority to address constitutional issues. *See Dee Enterprises*, 89 P.3d at 432; *also see Celebrity*

Custom Builders v. Indus. Claim Appeals Office, 916 P.2d 539, 541 (Colo. App. 1995) (administrative agencies do not have the authority to pass on constitutionality of statutes or ordinances). However, claimant has not cited any persuasive authority, and our research has yielded none, to support his proposition that every time an ALJ determines a claimant's right to workers' compensation benefits, he or she is addressing a constitutional issue. Therefore, we reject this argument.

The Panel's final order is affirmed.

JUDGE LOEB and JUDGE LICHTENSTEIN concur.

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-648-693

IN THE MATTER OF THE CLAIM OF PATRICK YOUNGS,

Claimant,

v.

WHITE MOVING & STORAGE, INC.,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

FINAL ORDER

The claimant seeks review of an order of Administrative Law Judge Broniak (ALJ) dated May 13, 2008 that determined the claimant was not permanently and totally disabled and found the claimant's permanent impairment resides on the schedule and not the whole person. We affirm.

The claimant had an industrial injury while lifting a couch on March 21, 2005. The claimant suffered a biceps tendon tear. The claimant underwent surgery, which required a piece of fascia lata subcutaneous tissue to be taken from his left thigh. Dr. Ladwig placed the claimant at maximum medical improvement (MMI) on May 4, 2006. Dr. Ladwig assessed an impairment rating of five percent to the

left upper extremity and five percent to the left lower extremity. The clamant had been working as a driver, but after the industrial injury it was determined that he did not meet the standards to operate a commercial vehicle in Colorado. The ALJ concluded that the claimant's functional impairment was limited to his left upper extremity and left lower extremity. On the issue of permanent partial disability, the ALJ awarded the claimant eight percent for his left upper extremity and five percent for his left lower extremity. The ALJ denied the claim for permanent total disability (PTD) benefits.

I.

On appeal, the claimant argues that he did not "get the benefit of the bargain" in the DIME process. The claimant's first argument involving the DIME process concerns testimony from the DIME physician that she personally only received $350 or $400 dollars from performing the DIME with the rest of the standard fee of $675 going to the medical organization where she worked. Therefore, the clamant contends he did not get what he paid for. We consider this argument to be without merit.

The claimant cites W.C. Rule of Procedure 11-4 (A), 7 Code Colo. Reg. 1101-3 at 47, which provides that the physician performing the DIME shall receive from the requesting party a fee of $675. However, there is no restriction contained in the rule on the amounts the DIME physician agrees to pay for assistance in the conduct of her practice. The DIME

physician testified that the group she was associated with Medical Ops Management (Med Ops) provided certain services for her. Med Ops made all the arrangements including scheduling the DIME exams. Further, Med Ops provided offices to examine the patients and took care of the billing and transcription. Barrett Depo. at 5.

Here the claimant underwent an evaluation by the DIME physician and a report from that examination was prepared and submitted into evidence. Exhibit 4. In our view, the fact that the claimant may not view the DIME report as favorable does not alter the fact that he received what he paid for.

The claimant next argues that the DIME was not fair and unbiased. The claimant contends that simply by using Med Ops in the preparation of the DIME report, the DIME physician violated W.C. Rule of Procedure 11-2(k), 7. Code Colo. Reg. 1101-3 at 44. The Workers' Compensation Act is generally silent regarding communication with a DIME physician. Whether and to what extent communication with the DIME physician is permitted is therefore governed by the rules of procedure promulgated by the Director. Rule 11-2(k) provides that a physician shall comply with the following:

> In order to assure fair and unbiased IME's, not engage in communication regarding the IME with any person other than Division staff, except under the following circumstances: the claimant during the IME examination, the requesting party when setting

> the appointment, by approval of the Director, both party written agreement, and order by an administrative law judge, by deposition or subpoena as approved by an administrative law judge.

The principles governing the interpretation of administrative regulations are the same as those concerning statutes. *Gerrity Oil and Gas Corp. v. Magness*, 923 P.2d 261 (Colo. App. 1995), *aff'd in part, rev'd in part on other grounds*, 946 P.2d 913 (Colo. 1997). In interpreting these provisions, we apply the ordinary rules of statutory construction. The purpose of statutory construction is to effect the legislative intent. Because the best indicator of legislative intent is the language of the statute, words and phrases in a statute should be given their plain and ordinary meanings. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). We do not depart from the plain meaning unless it leads to an absurd result. *Peregoy v. Industrial Claim Appeals Office,* 87 P.3d 261 (Colo. App. 2004).

In our view, Rule 11-2(k) was not designed to prevent communication between the DIME physician and personnel of a medical office necessary to handle the ministerial aspects of the DIME, such as arrangements for the examination and transcription of the report. In our view, to accept the claimant's interpretation of Rule 11-2(k) would lead to absurd results. Rather Rule 11-2(k) was designed to prevent contact between the DIME and any of the parties which could possibly taint the opinion of the DIME

physician. *See Lenox v. United Airlines*, W. C. No. 4-616-469 (June 02, 2006). Therefore, we are not persuaded by the claimant's argument that the DIME physician violated Rule 11-2(k).

The claimant's next argument involving the DIME process involves allegations of dishonest practices by Med Ops. After the conclusion of the initial hearing, accusations were made through a local new channel, that the owner of Med Ops modified medical reports. The claimant argues that deposition of Med Ops employees showed that they admitted changing medical records to benefit insurance companies and this violated Rule 11-2. The claimant further argues that the DIME physician here could not testify that her report had not been altered or changed by a third Party. The claimant filed a motion to strike the DIME and for a new hearing. The claimant attached copies of a news story regarding practices by Med Ops, an affidavit from a workers' compensation attorney expressing concerns about the DIME process and depositions of persons connected with Med Ops regarding changes in medical reports done without the knowledge of the physicians involved. The ALJ in an order dated August 22, 2007 ordered that a hearing be set for the claimant to present any evidence on the dishonest practices of Med. Ops and how the allegedly tainted DIME opinion would affect the ALJ's determination regarding PTD benefits. In an order dated September 12, 2007, the claimant was also allowed to depose the DIME physician. In an order dated January 8, 2008 the ALJ

denied the claimant's motion to strike the DIME and denied the motion for new hearing.

Because the issue of possible changes in the DIME physician's report is factual in nature, we must uphold the ALJ's determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. 2008. This standard of review requires us to consider the evidence in a light most favorable to the prevailing party, and defer to the ALJ's credibility determinations, resolution of conflicts in the evidence, and plausible inferences drawn from the record.

Here the ALJ found with record support that the DIME physician testified that nothing of substance had been changed in her report. Barrett Depo. at 15-16, 30. The ALJ further found that the new evidence regarding Med Ops failed to show that the result of the DIME performed here was changed. The claimant has not pointed to any specific evidence, nor are we aware of any evidence, indicating that the report of the DIME physician here was changed. Under these circumstances, we cannot say that the ALJ erred as a matter of law in her determination that that the DIME was not tainted despite the allegations against Med Ops.

Further, the specific relief request by the claimant here is for a new DIME to be scheduled and a new determination to be made on the issues of permanent partial disability and permanent total disability. However, the ALJ determination on the

claimant's entitlement to PTD disability benefits did not turn on the report of the DIME Physician but, as the claimant asserts in his brief in support of his petition to review, on the testimony of the respondents' vocational expert and the work restrictions identified by Dr. Ladwig.

In addition, the ALJ found that the claimant was only entitled to a scheduled, not a whole person, impairment rating. It is well established that the question of whether the claimant sustained a scheduled injury within the meaning of § 8-42-107(2)(a), C.R.S. 2008, or a whole person medical impairment compensable under § 8-42-107(8)(c), is one of fact for determination by the ALJ. *Kolar v. Industrial Claim Appeals Office*, 122 P.3d 1075 (Colo. App. 2005); *Walker v. Jim Fuoco Motor Co.*, 942 P.2d 1390 (Colo. App. 1997). Moreover, the ALJ after properly noting that the DIME physician's opinion was not entitled to presumptive effect on extremity ratings, found that the treating physician impairment rating of the left lower extremity was more persuasive than the DIME physician's opinion. The ALJ, based on the DIME physician's opinion, did award the claimant permanent partial disability of eight percent for his left upper extremity. However the claimant has not offered specific argument that the ALJ erred in this regard. Under these circumstances, any error regarding the DIME process was harmless and will be disregarded. See § 8-43-310 C.R.S. 2008, *A & R Concrete Construction v. Lightner*, 759 P.2d 831 (Colo. App. 1988).

II.

The claimant next contends that the ALJ, after allowing the matter to be set for an additional hearing on the alleged dishonest practices of Med Ops, abused her discretion by not allowing complete discovery surrounding the DIME process. Specifically, the claimant had requested that the respondent insurer be ordered to answer interrogatories generally directed to information concerning the contacts between the insurer and Med Ops and between the respondents' retained law firm and Med Ops. The ALJ denied this request for additional discovery.

Generally, we may not interfere with the ALJ's rulings concerning discovery unless there has been an abuse of discretion. *See Sheid v. Hewlett Packard*, 826 P.2d 396 (Colo. App. 1991); *Hoffman v. United Airlines, Inc*, W. C. No. 4-991-822 (September 23, 2002). The appellate standard on review of an alleged abuse of discretion is whether the ALJ's order exceeds the bounds of reason, as where it is contrary to the applicable law or unsupported by the evidence. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *Rosenberg v. Board of Education of School District #1*, 710 P.2d 1095 (Colo. 1985).

Here the additional hearing was set by the ALJ on the narrow issue of whether any alleged dishonest practices of the Med Ops employees had affected the DIME physician's opinion in this particular case and how the allegedly tainted DIME opinion would affect the ALJ's determination regarding permanent total

disability. The requested interrogatories can be viewed as not necessarily relevant to the issues set for hearing. Therefore, we cannot say that the ALJ's order refusing to order the respondents to answer interrogatories exceeds the bounds of reason.

In addition, we note that after the claimant had filed his motion for a new hearing and to strike the DIME because of the allegations involving Med Ops, the ALJ entered a procedural order on August 22, 2007 allowing the claimant to set a second hearing on the issues raised by the claimant. The ALJ further granted the claimant's motion to depose the DIME physician prior to the hearing set on the claimant's motion for a new hearing. At the hearing, the claimant presented no evidence other than the transcript of the DIME physician.

Further, the ALJ's first order on the merits of the case ruling against the claimant was issued on July 9, 2007 following a hearing held on May 2, 2007. In the motion for a new hearing and to strike the DIME, the claimant alleged that on May 15, 2007, thirteen days after the hearing, it became public knowledge because of a news story that employees of Med Ops had admitted improprieties. The claimant's motion was dated July 30, 2007 over two months after the news story and after the claimant knew that an order on the merits had been issued by the ALJ against him. Under these circumstances, we cannot say that at this late stage of the litigation, the ALJ's refusal to grant the claimant's additional discovery request constituted an abuse of discretion.

III.

The claimant next contends that the ALJ gave too much deference to the DIME physician. The claimant argues that in the ALJ's first order of July 9, 2007 the ALJ applied a "clear and convincing evidence" burden regarding permanent disability despite the fact that the ALJ found that the situs of the impairment resided on the schedule. However, the ALJ in the supplemental order under review here recognized her error and found that the DIME physician's opinion was not entitled to presumptive effect. Further, the ALJ on one element of permanent impairment found a treating physician's opinion to be more persuasive then the opinion of the DIME physician. The claimant argues that despite this change it is "transparent" that the ALJ gave too much deference to the DIME physician. We are not persuaded that the ALJ erred.

It is provided in §8-43-301(5), C.R.S. 2008 that in ruling on a petition to review, an administrative law judge may issue a supplemental order and may amend or alter the original order or set the matter for further hearing. The purpose of section §8-43-301(5) is to allow the ALJ to reconsider a prior order in view of errors and objections raised in a petition for review. Section 8-43-301(2); *Bimson v. May D & F*, W.C. 4-163-733 (June 29, 1994). It is clear that the situation contemplated in §8-43-301(5) is precisely what transpired in the present case and that the ALJ reconsidered her prior order and utilized the proper burden of

proof. Therefore, we see no reason to interfere with the ALJ's order.

IV.

The claimant finally asserts that the ALJ's finding that the claimant is not permanently and totally disabled is not supported by substantial evidence. Specifically, the claimant argues that the ALJ misunderstood the work restrictions provided by the claimant's treating physician, Dr. Ladwig. We disagree.

The ALJ found that Dr. Ladwig provided the following restrictions: lifting with both arms up to 30 pounds occasionally and 10-15 pounds frequently; no restrictions for the leg; occasional shoulder level or above reaching with left arm; and no driving duties while working. Findings of Fact, Conclusions of Law, and Order at 6, ¶ 23.

Because these issues are factual in nature, we must uphold the ALJ's determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. 2008. This standard of review requires us to defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. *Wal-Mart Stores Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). In particular, we note that the weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

The claimant's assertion notwithstanding, Dr. Ladwig's deposition testimony fully supports the ALJ's findings regarding the claimant's work restrictions. Dr. Ladwig testified that the claimant could occasionally lift in the "30-ish-pound range." Ladwig Depo. at 21. Dr. Ladwig testified that the claimant could lift "10, 15-ish on a moderately frequent basis with 30-ish as being the max." Ladwig Depo. at 22. Dr. Ladwig testified that there were no work restrictions applicable to the claimant's lower extremity. Ladwig Depo. at 31. Dr. Ladwig testified that the claimant could reach shoulder level on an occasional basis. Ladwig Depo. at 23-24. Dr. Ladwig testified that he would support a denial of the claimant's commercial driving license. Ladwig Depo. at 27.

The claimant argues that Dr. Ladwig in other parts of his testimony requested another functional capacity evaluation be performed. The claimant further argues that when offered the opportunity to agree with another physician's physical restrictions Dr. Ladwig merely stated he neither agreed nor disagreed with that physician's opinion. Exhibit 5 at 3. However, to the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

A claimant is entitled to PTD benefits if the claimant is "unable to earn wages in the same or other employment." Section 8-40-201(16.5)(a), C.R.S. 2008. Under the statute, the Claimant carries the

burden of proof to establish by a preponderance of the evidence that he is permanently and totally disabled. The overall objective is to determine whether employment is reasonably available to the claimant under his particular circumstances. In making this determination the ALJ may consider the effects of the industrial injury in light of claimant's "human factors." *Christie v. Coors Transportation Co.*, 933 P.2d 1330 (Colo. 1997). These factors may include the claimant's physical condition, mental ability, age, employment history, education and the "availability of work" the claimant can perform. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998).

Ultimately, whether a claimant is permanently and totally disabled is an issue of fact for resolution by the ALJ. *Weld County School District RE-12 v. Bymer, supra; Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999). Because the question of whether the claimant proved he is entitled to PTD benefits is factual in nature, we must uphold the ALJ's order if supported by substantial evidence in the record. Section 8-43 301(8). This standard of review requires us to view the evidence in a light most favorable to the prevailing party and, as noted above, defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. Thus, the scope of our review is "exceedingly narrow." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 415 (Colo. App. 1995). The fact that some evidence, if

credited, might support a different result affords no basis for relief on appeal. *Weld County School District Re-12 v. Bymer*, *supra*. In this regard, we note that the credibility of expert witnesses is a matter within the province of the ALJ as fact finder. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). It is according to this deferential standard of review that we consider the claimant's assertions.

Here, the ALJ noted that a surveillance video revealed the claimant in no apparent distress walking while holding a cane. Exhibit Q. Based on the credible testimony of the respondents' vocational expert and a consideration of a number of "human factors" the ALJ found that the claimant had failed to establish that it is more likely than not that he is unable to earn any wages in the same or other employment. Tr. at 156-57. The ALJ noted that the claimant was only 41 years old and had acquired sufficient skills throughout his employment history in order to earn wages. Exhibit M. The ALJ noted that despite the educational limitations that the claimant raised, the claimant can use a computer and had taken and passed a written commercial drivers' license examination. Tr. at 60. Although the claimant had been unable to continue commercial truck driving due to the inability to pass the physical test, the respondents' vocational expert had identified several vocational opportunities that were within the work restrictions provided by Dr. Ladwig. Exhibit M, Tr. at 149. The ALJ concluded that the claimant was capable of earning wages in some amount. In our view, the

record amply supports the ALJ's finding that the claimant was not permanently and totally disabled.

IT IS THEREFORE ORDERED that the ALJ's order dated May 13, 2008 is affirmed.

INDUSTRIAL CLAIM
APPEALS PANEL

/s/ John Baird
John D. Baird

/s/ Thomas Schrant
Thomas Schrant

NOTICE

This Order is final unless an action to modify or vacate this Order is commenced in the Colorado Court of Appeals, 2 East 14th Avenue, Denver, CO 80203, by filing a petition for review with the Court, within twenty (20) days after the date this Order is mailed, pursuant to § 8-43-301(10) and § 8-43-307, C.R.S. 2008. The appealing party must serve a copy of the petition upon all other parties, including the Industrial Claim Appeals Office, which may be served by mail at 633 17th Street, Suite 600, Denver CO 80202.

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 633 17th Street Suite 1300, Denver, CO 80202	
In the Matter of the Workers' Compensation Claim of: **PATRICK YOUNGS,** Claimant, vs. **WHITE MOVING & STORAGE, INC.,** Employer, and **PINNACOL ASSURANCE,** Insurer, Respondents.	▲COURT USE ONLY ▲ CASE NUMBER: **WC 4648-693**
SUPPLEMENTAL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER	

Hearing in this matter was held on May 2, 2007 before Laura A. Broniak, Administrative Law Judge. Claimant was present and represented by Chris Forsyth Esq. Respondents were represented by Richard J. Liby Esq. This matter was digitally recorded in the Great Sand Dunes Courtroom from 8:30 a.m. to 1:00 p.m. in Denver, Colorado. On July 11, 2007, the ALJ issued Findings of Fact, Conclusions of Law, and Order. Thereafter Claimant filed a Petition to Review and brief in support of the Petition and Respondents filed a Response Brief in Opposition to Claimant's Petitions to Review on April 15, 2008. After reviewing the petition and the briefs, the Judge

issues the following Supplemental Findings of Fact, Conclusions of Law, and Order pertaining only to the hearing held on May 2, 2007.

In this order, Patrick Youngs will be referred to as "Claimant"; White Moving & Storage, Inc. will be referred to as "Employer": and Pinnacol Assurance will be referred to as "Insurer."

Also In this order, "Judge" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes, (2006); "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-648-693

ISSUES

- Whether Claimant is permanently and totally disabled;
- Whether Claimant's impairment resides on the schedule or the whole person;
- If Claimant's impairment resides on the schedule, the percentage of impairment which should be assigned; and
- Whether Claimant has a disfigurement as result of the industrial injury.

FINDINGS OF FACT

1. Claimant is a 41-year-old man who Employer hired on March 21, 2005. He worked as a driver and mover. While lifting a couch for Employer on March 29, 2005, Claimant tore his left bicep tendon, for which Respondents admitted liability.

2. Respondents referred Claimant to Dr. Michael Ladwig for treatment and who ultimately diagnosed Claimant with a biceps tendon tear.

3. On April 22, 2005, claimant underwent surgery with Peter Berquist, M.D., to repair his torn biceps tendon.

4. Claimant did not recover as expected, so an MRI was conducted on July 14, 2005 which showed a recurrent tear. Claimant originally determined that he did not wish to undergo the surgery again and subsequently changed his mind. Therefore, on October 27, 2005, Dr. Craig Davis performed a reconstruction left distal biceps tendon with fascia lata graft from left thigh and tenolysis of the biceps tendon. During the procedure, Dr. Davis made a 15-cm incision on Claimant's left thigh and he cut through subcutaneous tissue to reach the fascia lata. He harvested a piece of fascia lata measuring approximately 15 cm long x 6 to 7 cm wide. The graft was then used to repair Claimant's biceps tendon.

5. Claimant thereafter underwent physical therapy through Stapleton Physical Therapy.

6. Claimant underwent a functional capacities evaluation ("FCE") at Stapleton Physical Therapy on May 1, 2006, which found, *inter alia,* that Claimant could lift up to 30 pounds occasionally and 20 pounds frequently (floor to waist), as well as 40 pounds occasionally and 30 pounds frequently (waist to shoulder). The FCE has a summary sheet that does not break down work restrictions between the right and left upper extremities for the lifting categories. The FCE report also states that Claimant may push 67 pounds combined weight with both arms, and may pull 73 pounds combined weight with both arms. The physical therapist also completed a range of motion study and rating worksheet which yielded a rating of 5% to the upper extremity and converted to a 3% whole person impairment. Claimant testified that the machines broke down several times during the completion of the FCE.

7. Dr. Ladwig found Claimant at maximum medical improvement ("MMI") on May 4, 2006, and imposed restrictions pursuant to the FCE completed on May 1, 2006. On May 8, 2006, Dr. Ladwig assessed an impairment rating of 5% to the left upper extremity and on August 8, 2006, Dr. Ladwig assessed an impairment rating of 5% to the left lower extremity. According to Dr. Ladwig, these impairment ratings converted to a 4% whole person impairment.

8. In June 2006, Claimant saw Clarence Kluck, M.D., a doctor who he testified he found on his own, for a Department of Transportation physical. As Claimant had been working as a driver he would

have needed to pass the fitness determination to continue his job as a driver and retain his commercial drivers' license. Dr. Kluck determined that Claimant did not meet the standards to operate a commercial vehicle in Colorado.

9. After being found at MMI, Claimant returned to Dr. Ladwig complaining of problems with his left leg at the graft harvest site. Dr. Ladwig referred Claimant to Franklin Shih, M.D., who evaluated claimant on July 21, 2006. Dr. Shih stated that he recommended leaving the problem alone, though if he wanted to consider medication, this would not be unreasonable. However, according to Dr. Shih, Claimant stated he was comfortable with leaving the problem alone. Mr. Youngs' companion also asked if this would cause limitations with Claimant's walking endurance. Dr. Shih stated that he did not think this would be caused by the graft harvest, though it could be the result of deconditioning, which he would expect to improve over time.

10. Claimant returned to work for the Employer after his second surgery, where he worked in the customer service department for approximately three months where he spoke to customers over the telephone and used a computer (primarily the mouse as opposed to the keyboard). Claimant was let go in August 2006 due to his inability to adequately perform the job, specifically typing with his left hand.

11. Claimant underwent an independent medical examination (IME) with Dr. Kluck on August 10,

2006. Dr. Kluck recited the restrictions given at the Stapleton FCE, but did not render any opinion on restrictions. Dr. Kluck rated Claimant at 12% scheduled upper extremity rating and a 5% scheduled lower extremity rating. The ratings combined for a 9% whole person impairment rating.

12. On September 18, 2006, Claimant underwent a Division IME (DIME) with Amelia Barrett, M.D. Dr. Barrett issued a report on September 27, 2006 in which she concurred with the May 4, 2006 date of MMI. She rated claimant at 8% impairment of the left upper extremity based on her physical examination of Claimant's arm and 3% left lower extremity impairment due to sensory loss at the graft site in the thigh. Dr. Barrett opined that Claimant's lateral femoral cutaneous nerve itself was not injured, but provided no other support for her rating of Claimant's left lower extremity.

13. According to Dr. Barrett's report, the last physical therapy note of May 1, 2006 states that Claimant had full range of motion at the elbow, as well as full pronation and supination of the left forearm.

14. On April 9, 2007, Dr. Kluck addressed the DIME findings. He opined that the impairment rating provided for the lower extremity by the DIME physician was clearly wrong because it did not properly account for the removal of Claimant's fascia lata. Dr Kluck believes that Claimant's nerve was permanently damaged based on Claimant's symptoms

of pain and numbness of the left thigh. Dr. Kluck opined that Dr. Barrett should have classified the lower extremity as decreased sensation with or without pain which interferes with activity. According to Dr. Kluck, Claimant then would have received a 5% impairment of the left thigh, which is 2% impairment of the whole person pursuant to the AMA Guides, Table 56. Dr. Kluck determined that Claimant had an area of increased light touch pinprick sensation approximately one inch long either side off his scar in the left lateral thigh.

15. Gail Gherig performed a FCE on January 22, 2007, which showed that Claimant was able to handle 18 to 25 pounds occasionally with maximal weights two times per hour. Ms. Gherig's report also indicated that Claimant could not withstand constant, negligible left upper extremity work tasks, reaching above shoulder level or repetitive motions. She reported that Claimant can perform a left reach shoulder level one time per hour, upper extremity tasks with an equal work/rest ratio, and upper extremity tasks primarily within the ergonomic box and that he should not kneel, crawl, climb or engage in sustained squatting or crouching. Ms. Gherig also recommended that Claimant would need to sit intermittently four hours per eight-hour day, and that Claimant could withstand walking and standing approximately 1 hour per 8-hour day.

16. The treating physician, Dr. Ladwig, was deposed on March 13, 2007. Dr. Ladwig viewed the FCEs that had been done and stated that the truth

was probably somewhere in the middle of the two. Dr. Ladwig suggested that Claimant undergo another FCE, which apparently did not occur.

17. Dr. Ladwig was asked by Respondents to go over a list of jobs that Roger Ryan created, and determine whether he thought Claimant could perform the jobs. In reviewing the list of jobs, Dr. Ladwig stated that he did not believe the descriptions were accurate. Therefore, he approved some jobs and not others when the descriptions were almost identical. Dr. Ladwig agreed with Dr. Kluck that Claimant could no longer drive commercially. Dr. Ladwig would not approve a commercial driver's license because he saw potential liability for himself. Dr. Ladwig stated that Claimant could perform work in a category that falls between sedentary and light.

18. Dr. Kluck, with no explanation for his conclusions, provided restrictions by way of a letter dated April 9, 2007, in which he wrote:

> His restrictions would include no lifting, pushing or pulling over 2 lbs. with the left arm. Avoid any repetitive lifting, pushing or pulling with the left arm. He should not reach over shoulder level with the left arm. Repetitive motions should not include use of the left elbow. Walking, standing and sitting would not be limited, unless this was associated with use of the left arm for other reasons. He should avoid handling anything with his left fingers that is moderately cold or hot and his hands should not be exposed

> to cold temperatures for prolonged periods of time. There should be no driving. Pronation should be limited. Protect his right arm from overuse such as pushing or pulling over 25 lbs.

19. Claimant has a high school education. He graduated 64th out of a class of 65. Claimant testified that he took special education classes in high school because the classes taught skills of daily living that he would need although none of those courses appeared on his high school transcript. He recently took tests at Emily Griffith that shows his math skills are in the 26th national percentile and his reading skills are in the 77th national percentile.

20. Claimant has previously worked as a driver, in maintenance, groundskeeping and has performed janitorial work. During his light duty position with Employer, Claimant used a computer and talked to customers on the telephone. In 2002, Claimant obtained a commercial driver's license, which required him to take and pass a written examination.

21. Claimant did not initially look for employment after he lost his job with Employer in August 2006, but testified he did begin a job search approximately two months before the hearing. Claimant testified that he had applied for a few jobs near his home but that none of the employers he actually spoke to would hire him due to his restrictions, although it was not made clear what restrictions Claimant reported to the prospective employers. Claimant also testified that he contacted the Douglas

County Workforce, performed internet searches for employment at two different websites, which included posting his résumé online.

22. Claimant introduced the report and testimony of vocational expert Dr. Tony Manuele. Based on Claimant's work experience, education, and physical limitations, Dr. Manuele opined that Claimant is unable to earn wages in his local labor market. Dr. Manuele explained that Claimant had always worked in physically demanding jobs and that all jobs that Claimant would qualify for require bilateral use of the upper extremities. Based on the work restrictions provided by Dr. Kluck, Dr. Manuele opined that Claimant had such minimal use of his left arm that he was basically one-armed for vocational purposes. Dr. Manuele testified that he used the restrictions provided by Dr. Kluck because he thought they were the mid-level work restrictions of the three sets of work restrictions provided although Dr. Manuele also testified that he never saw the results of the FCE performed on May 1, 2006 by Stapleton Physical Therapy.

23. Respondents introduced the report and testimony of vocational expert Roger Ryan. Mr. Ryan relied on the restrictions Dr. Ladwig provided during his deposition which were as follows: lifting with both arms up to 30 pounds occasionally and 10-15 pounds frequently; no restrictions for the leg; occasional shoulder level or above reaching with left arm; and no driving duties while working. Mr. Ryan credibly explained that Claimant is able to perform light to

sedentary, full or part time work such as advertising material distributor, fast food lobby attendant, unarmed security guard, storage facility rental clerk and parking lot attendant.

24. Mr. Ryan stated that specifically for the unarmed security position, most employers are willing to accommodate the needs of the employee and often hire individuals who do have limitations. Mr. Ryan also indicated that the unarmed security guard position does not involve any heavy lifting and that he knew of individuals that actually have one arm and have worked as unarmed security guards.

25. A surveillance video of Claimant taken on March 2, 5 and 5, 2007, reveals Claimant, in no apparent distress, walking while holding a cane in his left hand. Although the video shows Claimant walking slowly he appears to have no problem walking with the cane in his left hand while clutching items in his right hand. Claimant did not lean on the cane while walking.

26. Based on the credible testimony of vocational expert Mr. Ryan and a consideration of a number of "human factors" Claimant has failed to establish that it is more likely than not that he unable to earn any wages in the same or other employment. Claimant is only 41 years old and has acquired sufficient skills throughout his employment history in order to earn wages. Despite the educational limitations that Claimant raised, Claimant can use a computer and has taken and passed a written commercial drivers'

license examination. Although Claimant has been unable to continue commercial truck driving due to the inability to pass the physical test, Mr. Ryan has identified several vocational opportunities that are within the work restrictions provided by Dr. Ladwig. Claimant is thus capable of earning wages in some amount.

28. Claimant's functional impairment is limited to his left upper extremity and left lower extremity and no persuasive evidence was introduced to the contrary. As such, Claimant's impairment is on the schedule of permanent impairment rather than as to the whole person.

27. Claimant has established, by a preponderance of the evidence, that he is entitled to an impairment of 8% for his left upper extremity. Dr. Barrett appropriately determined this impairment rating based upon her examination of Claimant and the AMA Guides. No persuasive evidence was introduced to the contrary.

28. Claimant has established, by a preponderance of the evidence, that he is entitled to a 5% left lower extremity rating. While Dr. Barrett assigned a 3% lower extremity rating, her opinion is not entitled to presumptive effect. Moreover, Dr. Ladwig, who treated Claimant over a significant period of time, determined that Claimant sustained a 5% impairment of the left lower extremity. The Judge infers that Dr. Ladwig's opinion is based upon the Claimant's reports of decreased sensation which interferes

with activity. Dr. Barrett's assessment of 3% is less persuasive because Dr. Barrett utilized grade two under Table 10 in the AMA guides but provided no support for her use of grade two other than to opine that Claimant did not injure the nerve. Determination of the grade is not dependent upon whether an individual sustained an injury to the nerve rather it is whether the individual has decreased sensation with or without pain which interferes with activity or which is forgotten with activity.

29. As a result of this work injury, Claimant has a visible disfigurement to the body consisting of a surgical scar from the graph on Claimant's thigh approximately 7.5 inches in length; and scars on Claimant's left arm in the approximate lengths of 3.25 inches on the outer part of the forearm, 3.5 inches on the inner elbow area, and a 2.0125 inch, thick and discolored scar on the bicep area. These areas are normally exposed to public view.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Judge enters the following Conclusions of law:

1. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792

(1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

Permanent Total Disability

4. Section 8-40-201(16.5)(a) defines permanent total disability as the inability to earn "any wages in the same or other employment." *Christie v. Coors Transportation Co.*, 933 P.2d 1330 (Colo. 1997). Under the statute, the claimant carries the burden of proof to establish permanent total disability by a

preponderance of the evidence. The question of whether the claimant proved permanent total disability is a question of fact for resolution by the Administrative Law Judge. Under this statute, a claimant is not permanently and totally disabled if she able to earn some wages in modified, sedentary, or part time employment. *McKinney v. Industrial Claim Appeals Office*, 894 P.2d 42 (Colo. App. 1995).

5. In ascertaining whether a claimant is able to earn any wages, the Judge may consider various "human factors," including a claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550, 556 (Colo. 1998); *Holly Nursing v. ICAO,* 992 P.2d 701, 703 (Colo. App. 1999). The overall objective of this standard is to determine whether, in view of all of these factors, employment is "reasonably available to the claimant under his or her particular circumstances." *Bymer*, 955 P.2d at 557.

6. As found, based on the credible testimony of vocational expert Mr. Ryan and a consideration of a number of "human factors" Claimant has failed to establish that it is more likely than not that he unable to earn any wages in the same or other employment. Claimant is only 41 years old and has acquired sufficient skills throughout his employment history in order to earn wages. Despite the educational limitations that Claimant raised, Claimant has learned to use a computer and has taken and passed a written commercial drivers' license examination.

Although Claimant has been unable to continue commercial truck driving due to the inability to pass the physical test, Mr. Ryan has identified several vocational opportunities that are within the work restrictions provided by Dr. Ladwig. Claimant is thus capable of earning wages in some amount.

Permanent Partial Disability –
Situs of the Functional Impairment

7. Section 8-42-107, C.R.S., sets forth two different methods of compensating medical impairment. Subsection (2) provides a schedule of disabilities and subsection (8) provides a Division IME process for whole person ratings. The threshold issue is application of the schedule and this is a determination of fact based upon a preponderance of the evidence. The application of the schedule depends upon the "situs of the functional impairment" rather than just the situs of the original work injury. *Langton v. Rocky Mountain Health Care Corp.*, 937 P.2d 803 (Colo. App. 1996); *Strauch v. PSL Swedish Health Care System,* 917 P.2d 366 (Colo. App. 1996).

8. The question of whether the claimant sustained a whole person medical impairment compensable under § 8-42-107(8), C.R.S., is one of fact for determination by the ALJ. In resolving this question, the ALJ must determine the situs of the "functional impairment" and the situs of the functional impairment is not necessarily the location of the injury itself. *Langton v. Rocky Mountain Health Care Corp.*

937 P.2d 883 (Colo. App. 1996); *Stauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996).

9. Claimant has not proven by a preponderance of the evidence that the situs of his functional impairment is beyond his right upper extremity or his left lower extremity. Claimant suffered a biceps tendon tear in addition to the removal of fascia from his left lower extremity. No persuasive evidence was presented that the tear or the removal of the fascia should result in a whole person impairment. Consequently, Claimant's impairment resides on the schedule.

Permanent Partial Disability –
Impairment Ratings

10. The increased burden proof provisions contained in §8-42-107 (8)(c), C.R.S., only apply in cases of non-scheduled injuries. See *Delaney v. Industrial Claims Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000). The percentage rating for scheduled benefits is determined based simply upon the preponderance of the evidence.

11. Claimant has established, by a preponderance of the evidence, that he is entitled to an impairment of 8% for his left upper extremity. Dr. Barrett appropriately determined this impairment rating based upon her examination of Claimant and the AMA Guides. No persuasive evidence was introduced to the contrary.

12. As found, Claimant has established, by a preponderance of the evidence, that he is entitled to a 5% left lower extremity rating. While DIME physician, Dr. Barrett, assigned a 3% lower extremity rating, her opinion is not entitled to presumptive effect. Moreover, Dr. Ladwig, who treated Claimant over a significant period of time, found that Claimant sustained a 5% impairment of the left lower extremity. The Judge infers that Dr. Ladwig's opinion is based upon the Claimant's reports of decreased sensation which interferes with activity. Dr. Barrett's assessment of 3% is less persuasive because Dr. Barrett utilized grade two under Table 10 in the AMA guides but provided no support for her use of grade two other than to opine that Claimant did not injure the nerve. According to the AMA Guides, determination of the grade is not dependent upon whether an individual sustained an injury to the nerve rather it is whether the individual has decreased sensation with or without pain which interferes with activity or which is forgotten with activity.

Disfigurement

13. Pursuant to §8-42-108, C.R.S., Claimant is entitled to a discretionary award up to $2,000 for his serious and permanent bodily disfigurement that is normally exposed to public view. As found, Claimant has sustained a serious permanent disfigurement to areas of his body normally exposed to public view. Accordingly, Claimant is entitled to disfigurement benefits in the amount of $2,000.00, payable in one

lump sum. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

ORDER

It is therefore ordered that:

1. Claimant is not permanently and totally disabled.

2. Claimant's impairment resides on the schedule and not the whole person.

3. Claimant's permanent impairment is 8% for the left upper extremity and 5% for the left lower extremity.

4. Claimant is entitled to disfigurement benefits in the amount of $2,000.00.

5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

This decision of the Judge is final, unless a Petition to Review this decision is filed within twenty (20) days from the date this decision is served. Section 8-43-301(2), C.R.S. Pursuant to the June 15, 2007, delegation of the Director of the Division of Workers' Compensation, the Petition to Review shall be filed with the Office of Administrative Courts, 633 17th Street,

Suite 1300, Denver, Colorado 80202. See Rule 26, OACRP for further information regarding the procedure to be followed when filing a Petition to Review.

DATED: May 13, 2008

DIGITAL SIGNATURE:
L. Broniak

/s/

Laura A. Broniak
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

Colorado Court of Appeals 2 East 14th Ave., Third Floor Denver, CO 80203	**COPIES MAILED TO COUNSEL OF RECORD** Tr. Ct. Judge [Illegible] Clerk
Industrial Claim Appeals Office wc4648693	~~AND~~ _____ ON 4-8-09 BY ACG
Petitioner: Patrick Young, **v.** **Respondents:** White Moving & Storage, Inc; Pinnacol Assurance; and Industrial Claim Appeals Office.	Court of Appeals Case Number: 2008CA2209
ORDER OF COURT	

Upon consideration of the motion for disqualification of judges and the response, the Court DENIES the motion. *See* Order of February 10, 2009 in appeal 08CA0923.

Upon consideration of the motion regarding due process and for an evidentiary hearing and the response, the Court DEFERS ruling to the division considering the merits of the appeal.

Upon consideration of the motion for extension of time to file the answer brief, the Court GRANTS the motion. The answer brief is due 14 days from the date of this Order.

Date: 4-8-09

BY THE COURT
Casebolt, J.

jb/lj

Colorado Court of Appeals 2 East 14th Ave., Third Floor Denver, CO 80203	**COPIES MAILED TO COUNSEL OF RECORD** Tr. Ct. Judge D. Ct. Clerk
Industrial Claim Appeals Office wc4648693	AND _____
Petitioner: Patrick Youngs, **v.**	ON 02/18/10 BY [Illegible]
Respondents: White Moving & Storage, Inc; Pinnacol Assurance; and Industrial Claim Appeals Office.	Court of Appeals Case Number: 2008CA2209
ORDER DENYING PETITION FOR REHEARING	

The **PETITION FOR REHEARING** filed in this appeal by: Patrick Youngs, Petitioner

IT IS THIS DAY ORDERED that said Petition shall be, and the same hereby is, DENIED. OPINION MODIFIED AND PETITION FOR REHEARING IS **DENIED**.

Issuance of the Mandate is stayed until: March 8, 2010.

If a Petition for Certiorari is timely filed with the Supreme Court of Colorado, the stay shall remain in effect until disposition of the cause by that Court.

DATE: FEBRUARY 18, 2010

BY THE COURT:

Judge Hawthorne
Judge Loeb
Judge Lichtenstein

Colorado Supreme Court 101 West Colfax Avenue, Suite 800 Denver, CO 80202	
Certiorari to the Court of Appeals, 2008CA2209 Industrial Claim Appeals Office, WC4648693	
Petitioner: Patrick Youngs, **v.** **Respondents:** Industrial Claim Appeals Office of the State of Colorado; White Moving and Storage, Inc.; and Pinnacol Assurance.	Supreme Court Case No: 2010SC150
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals.

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, MAY 24, 2010.

[SEAL]

Colo. Rev. Stat. § 8-1-102. Industrial claim appeals office – creation – powers and duties.

(1) There is hereby created in the office of the executive director of the department of labor and employment the industrial claim appeals office, which may consist of five industrial claim appeals examiners, who shall be appointed to serve on the industrial claim appeals panel by the executive director pursuant to section 13 of article XII of the state constitution and the laws and rules governing the state personnel system. Each industrial claim appeals examiner shall exercise such examiner's powers and perform such examiner's duties and functions in the industrial claim appeals office within the office of the executive director of the department as if transferred thereto by a **type 2** transfer as such transfer is defined in the "Administrative Organization Act of 1968", article 1 of title 24, C.R.S. Decisions and orders of the industrial claim appeals panel may be made by two appeals examiners. In the event of a disagreement between such two appeals examiners, a third appeals examiner shall review the case, and the decision and final order of the appeals panel shall reflect the collective decision of all three appeals examiners.

(2) The industrial claim appeals panel has the duty and the power to conduct administrative appellate review of any order entered pursuant to articles 43 and 74 of this title and to make a decision on said appeal.

Colo. Rev. Stat. § 8-40-102. Legislative declaration.

(1) It is the intent of the general assembly that the "Workers' Compensation Act of Colorado" be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation, recognizing that the workers' compensation system in Colorado is based on a mutual renunciation of common law rights and defenses by employers and employees alike.

(2) The general assembly hereby finds that the determination of whether an individual is an employee for purposes of the "Workers' Compensation Act of Colorado" is subject to a great deal of speculation and litigation. It is the intent of the general assembly to provide an easily ascertainable standard for determining whether an individual is an employee. In order to further this objective, the test for determining whether an individual is an employee for the purposes of the "Workers' Compensation Act of Colorado" shall be based on the nine criteria found in section 8-40-202(2)(b)(II) which shall supersede the common law. The fact that an individual performs services exclusively or primarily for another shall not be conclusive evidence that the individual is an employee.

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Colo. Rev. Stat. § 8-43-201. Disputes arising under "Workers' Compensation Act of Colorado".

PART 2 SETTLEMENT AND HEARING PROCEDURES

The director and administrative law judges employed by the office of administrative courts in the department of personnel shall have original jurisdiction to hear and decide all matters arising under articles 40 to 47 of this title; except that the following principles shall apply: A claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer; and a workers' compensation case shall be decided on its merits.

Colo. Rev. Stat. § 8-43-301. Petitions to review.

(1) Any order, corrected order, or supplemental order is final unless a petition to review or appeal has been filed in accordance with this article.

(2) Any party dissatisfied with an order that requires any party to pay a penalty or benefits or denies a claimant any benefit or penalty may file a petition to review with the division, if the order was entered by the director, or at the Denver office of the office of administrative courts in the department of personnel, if the order was entered by an

administrative law judge, and serve the same by mail on all the parties. The petition shall be filed within twenty days after the date of the certificate of mailing of the order, and, unless so filed, the order shall be final. The petition to review may be filed by mail, and shall be deemed filed upon the date of mailing, as determined by the certificate of mailing, if the certificate of mailing indicates that the petition to review was mailed to the division or to the Denver office of the office of administrative courts in the department of personnel, as appropriate. The petition to review shall be in writing and shall set forth in detail the particular errors and objections of the petitioner. A petitioner shall, at the same time, order any transcript relied upon for the petition to review, arrange with the hearing reporter to pay for the same, and notify opposing parties of the transcript ordered. Opposing parties shall have twenty days after the date of the certificate of mailing of the petition to review to order any other transcript not ordered by the petitioner and arrange with the hearing reporter to pay for the same.

(3) If transcripts of hearings are ordered as part of the record in a petition to review, the director or administrative law judge cannot rule on the petition until the transcripts are lodged with the division.

(4) When the record upon which a petition to review has been filed is complete, the parties shall be notified in writing. The petitioner shall have twenty days after the date of the certificate of mailing of the notice to file a brief in support of the petition. The

opposing parties shall have twenty days after the date of the certificate of mailing of the petitioner's brief to file briefs in opposition thereto. After the briefs are filed or the time for filing has run, the director or administrative law judge shall have thirty days to enter a supplemental order or transmit the file to the industrial claim appeals office for review.

(5) In ruling on a petition to review, the director or administrative law judge may issue a supplemental order labeled as such limited to the matters raised in the petition to review, and, as to those matters, the director or administrative law judge may amend or alter the original order or set the matter for further hearing. In any event, if it has not already been done, the administrative law judge or director, following a petition to review an order, shall make findings of fact and conclusions of law necessary to support such order.

(6) A party dissatisfied with a supplemental order may file a petition for review by the panel. The petition shall be filed with the division if the supplemental order was issued by the director, or at the office of the administrative courts in the department of personnel if the supplemental order was issued by an administrative law judge. The petition shall be filed within twenty days after the date of the certificate of mailing of the supplemental order. The petition shall be in writing, shall set forth in detail the particular errors and objections relied upon, and shall be accompanied by a brief in support thereof. The petition and brief shall be mailed by petitioner to all

other parties at the time the petition is filed. All parties, except the petitioner, shall be deemed opposing parties and shall have twenty days after the date of the certificate of mailing of the petition and brief to file with the division or the office of administrative courts, as appropriate, briefs in opposition to the petition.

(7) When any petition for review by the panel is filed, the division or the office of administrative courts shall, when all briefs are submitted to the division or office of administrative courts or within fifteen days after the date briefs were due, certify and transmit the record to the industrial claim appeals office along with the petitions and briefs. The division shall simultaneously send notice to the parties including the date that the record has been transmitted to the industrial claim appeals office.

(8) The industrial claim appeals office shall have sixty days after receipt of the certified record to enter its order. The panel may issue a summary order affirming the order of the administrative law judge or director. The panel may correct, set aside, or remand any order but only upon the following grounds: That the findings of fact are not sufficient to permit appellate review; that conflicts in the evidence are not resolved in the record; that the findings of fact are not supported by the evidence; that the findings of fact do not support the order; or that the award or denial of benefits is not supported by applicable law. If the findings of fact entered by the director or

administrative law judge are supported by substantial evidence, they shall not be altered by the panel.

(9) The panel shall have the power to issue such procedural orders as may be necessary to carry out its appellate review under subsection (7) of this section, including but not limited to, orders concerning completion of the record and filing of briefs. In those cases where the parties file a stipulated motion requesting that consideration of the appeal be deferred pending ongoing settlement negotiations, the panel may extend the time for entry of its order up to a maximum of thirty days.

(10) The panel's order shall be mailed to all parties of record. Any party dissatisfied with the panel's order shall have twenty days after the date of the certificate of mailing of such order to commence an action for judicial review in the court of appeals.

(11) If the panel has failed to enter its order within sixty days of the receipt of the certified record, the order of the director or administrative law judge shall be deemed the order of the panel and final unless, within thirty days after the end of the sixty-day period, the petitioner commences an action for judicial review in the court of appeals. If the panel has not acted on the sixtieth day, the industrial claim appeals office shall send a written notice to all parties stating that the parties have thirty days after the date of the certificate of mailing of the notice to commence such an action.

(12) If a petition to review is filed, a hearing may be held and orders entered on any other issue in the case during the pendency of the petition to review. If the order which is under petition to review concerns compensability, orders entered on these later issues are final and appealable when entered, but not enforceable until the review of the order on compensability is completed.

(13) If the order which is under petition to review does not concern compensability, but concerns the respective liability of two or more employers or insurance carriers, and the injury or illness was found compensable in a hearing held pursuant to section 8-43-215, the employer or insurance carrier found liable by the director or administrative law judge shall pay benefits in accordance with the order under review until the review process is completed, at which time it shall be reimbursed by the other employer or carrier if reimbursement is necessary to comply with the final order.

(14) The signature of an attorney on a petition to review or brief in support thereof constitutes a certificate by the attorney that such attorney has read the petition or brief; that, to the best of the attorney's knowledge, information, or belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass, cause delay, or unnecessarily increase the cost of litigation. If a

petition or brief is signed in violation of this subsection (14), the director, the administrative law judge, or the panel shall award reasonable attorney fees and costs to the party incurring the fees and costs as a result of the improper actions.

Colo. Rev. Stat. § 8-43-307. Appeals to court of appeals.

(1) The final order of the director or the panel shall constitute the final order of the division. Any person in interest, including Pinnacol Assurance, being dissatisfied with any final order of the division, may commence an action in the court of appeals against the industrial claim appeals office as defendant to modify or vacate any such order on the grounds set forth in section 8-43-308.

(2) All such actions shall have precedence over any civil cause of a different nature pending in such court, and the court of appeals shall always be deemed open for the trial thereof, and such actions shall be tried and determined by the court of appeals in the manner provided for other civil actions.

(3) (Deleted by amendment, L. 95, p. 235, § 3, effective April 17, 1995.)

(4) In any case before the court of appeals pursuant to this section, the court may apply the sanctions of rule 38 of the Colorado appellate rules if the court finds such application to be appropriate.

Colo. Rev. Stat. § 8-43-308. Causes for setting aside award.

Upon hearing the action, the court of appeals may affirm or set aside such order, but only upon the following grounds: That the findings of fact are not sufficient to permit appellate review; that conflicts in the evidence are not resolved in the record; that the findings of fact are not supported by the evidence; that the findings of act do not support the order; or that the award or denial of benefits is not supported by applicable law. If the findings of fact entered by the director or administrative law judge are supported by substantial evidence, they shall not be altered by the court of appeals.

Colo. Rev. Stat. § 8-43-309. Actions in court tried within thirty days.

Any such action commenced in the court of appeals to set aside or modify any order shall be heard within thirty days after issue shall be joined, unless continued on order of the court for good cause shown. No continuance shall be for longer than thirty days at one time.

Colo. Rev. Stat. § 8-47-101. Division of workers' compensation – creation – powers, duties, and functions – transfer of functions – change of statutory references.

(1) There is hereby created the division of workers' compensation in the department of labor and employment. Pursuant to section 13 of article XII of the state constitution, the executive director of the department of labor and employment shall appoint the director of the division of workers' compensation, and the director shall appoint such employees as are necessary to carry out the duties and exercise the powers conferred by law upon the division of workers' compensation and the director.

(2) The director and the division of workers' compensation shall enforce and administer the provisions of the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title, as provided in said articles and the provisions of article 14.5 of this title.

(3)(a) The division of workers' compensation shall, on and after July 1, 1991, execute, administer, perform, and enforce the rights, powers, duties, functions, and obligations vested in the division of labor prior to July 1, 1991, concerning the duties and functions transferred to the division of workers' compensation. On July 1, 1991, all employees of the division of labor whose principal duties are concerned with the duties and functions transferred to the division of workers' compensation and whose employment in the division of workers' compensation is deemed necessary by the executive director of the department of

labor and employment to carry out the purposes of this article shall be transferred to the division of workers' compensation and shall become employees thereof. Such employees shall retain all rights to the state personnel system and retirement benefits under the laws of this state, and their services shall be deemed to have been continuous. All transfers and any abolishment of positions in the state personnel system shall be made and processed in accordance with state personnel system laws and rules and regulations.

(b) Repealed.

(c) Whenever the division of labor is referred to or designated by any contract or other document in connection with the duties and functions transferred to the division of workers' compensation, such reference or designation shall be deemed to apply to the division of workers' compensation. All contracts entered into by the said division of labor prior to July 1, 1991, in connection with the duties and functions transferred to the division of workers' compensation are hereby validated, with the division of workers' compensation succeeding to all the rights and obligations of such contracts. Any appropriations of funds from prior fiscal years open to satisfy obligations incurred under such contracts are hereby transferred and appropriated to the division of workers' compensation for the payment of such obligations.

(d)(I) Repealed.

(II) Commencing in the 1992 legislative session and at least every four years thereafter, the general assembly shall provide for the conduct of a performance review by the state auditor of the administrative law judges in the office of administrative courts who hear cases under articles 40 to 47 of this title. The review shall include, but not be limited to, the following topics: The time elapsed from the date of hearing until decisions are rendered by the administrative law judges; the time elapsed from the point at which the file is complete and the case is ready for order until the decision is rendered by the administrative law judges; the number of decisions that are reversed upon appeal to the industrial claim appeals panel and to the court of appeals respectively; the workload or number of cases assigned to each administrative law judge; and the public perception of the quality of the performance of the office of administrative courts with respect to matters arising under the "Workers' Compensation Act of Colorado".

(4) Repealed.

(5) On and after July 1, 1991, when any provision of articles 40 to 47 of this title refers to the division of labor said law shall be construed as referring to the division of workers' compensation.

(6) The revisor of statutes is authorized to change all references to the director of the division of labor, and the division of labor in articles 14.5 and 40 to 47 of this title to refer to the director of the division

of workers' compensation and the division of workers' compensation.

Colo. Rev. Stat. § 24-30-1001. Office of administrative courts – administrative courts cash fund – creation.

(1) Effective July 1, 2005, there is hereby created the office of administrative courts in the department of personnel, the head of which shall be the executive director of the department of personnel. The office of administrative courts shall exercise its powers, duties, and functions as a **type 2** agency.

(2) The executive director at the department of personnel shall establish and maintain administrative offices and courts for the office of administrative courts in Denver, and in the southern region and on the western slope of the state, in addition to such other offices and courts as the executive director deems necessary to carry out the powers, duties, and functions of the office of administrative courts.

(3) The executive director of the department of personnel shall establish any fees or cost allocation billing process necessary to pay for the direct and indirect costs of the office of administrative courts. The department of personnel shall not establish a fee for individuals or beneficiaries that have a right to an administrative hearing without prior approval of the associated state agency and formal rule-making related to the fee pursuant to article 4 of this title. All

moneys collected shall be transmitted to the state treasurer, who shall credit the same to the administrative courts cash fund, which fund is hereby created. The moneys in the fund shall be subject to annual appropriation by the general assembly for the direct and indirect costs of the office of administrative courts. All interest derived from the deposit and investment of moneys in the fund shall be credited to the fund. Any unexpended and unencumbered moneys remaining in the fund at the end of a fiscal year shall remain in the fund and shall not be credited or transferred to the general fund or any other fund.

Colo. Rev. Stat. § 24-30-1003. Administrative law judges – appointment – qualifications – standards of conduct.

(1) The executive director of the department of personnel may appoint such administrative law judges except those employed pursuant to sections 24-50-103(7) and 40-2-104, C.R.S., as may be necessary to provide services to each state agency, except the state personnel board and the public utilities commission, entitled to use administrative law judges. Administrative law judges shall be appointed in accordance with the provisions of section 13 of article XII of the state constitution and the laws and rules governing the state personnel system.

(1.5) The director of the office of administrative courts shall appoint and assign administrative law judges to hear particular cases or classes of cases that

come before the office of administrative courts in a manner that, in the discretion of such director, is necessary and appropriate to provide services to each state agency.

(2) Any administrative law judge shall meet the same qualifications as a district court judge as provided in section 11 of article VI of the state constitution.

(3) (Deleted by amendment, L. 91, p. 1340, § 57, effective July 1, 1991.)

(4)(a) Administrative law judges appointed pursuant to this section shall be subject to the standards of conduct set forth in the Colorado code of judicial conduct.. The performance review plan for each administrative law judge shall include this Colorado code of judicial conduct.

(b) A complaint alleging a violation of the Colorado code of judicial conduct shall be referred to the executive director of the department of personnel who shall investigate the complaint and determine if the administrative law judge violated any canons of the code. Such administrative law judge shall be subject to the disciplinary procedures set forth in rules adopted by the state personnel board.

(c) If the decision is unsatisfactory to any party, an appeal may be made to the board of ethics for the executive branch of state government in the office of the governor.

(d) If the administrative law judge is found by the executive director or the board of ethics to have acted in violation of the canons of the Colorado code of judicial conduct, then the decision shall be made a part of the personnel file of the administrative law judge against whom the complaint was filed.

(5) In addition to the authority set forth in section 24-4-105 or as otherwise provided by law, administrative law judges in the office of administrative courts shall have the power to:

(a) Issue subpoenas, administer oaths, and control the course of trials and other proceedings before them; and

(b) Engage in or encourage the use of alternative dispute resolution as appropriate.

CONSTITUTION OF THE STATE OF COLORADO

Article II. Bill of Rights

§ 25. Due process of law

No person shall be deprived of life, liberty or property, without due process of law.

Article III. Distribution of Powers

The powers of the government of this state are divided into three distinct departments, – the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

Article VI. Judicial Department

§ 9. District courts – jurisdiction

(1) The district courts shall be trial courts of record with general jurisdiction, and shall have original jurisdiction in all civil, probate, and criminal cases, except as otherwise provided herein, and shall have such appellate jurisdiction as may be prescribed by law.

* * *

Article VI. Judicial Department

§ 20. Vacancies

(1) A vacancy in any judicial office in any court of record shall be filled by appointment of the governor, from a list of three nominees for the supreme court and any intermediate appellate court, and from a list of two or three nominees for all other courts of record, such list to be certified to him by the supreme court nominating commission for a vacancy in the supreme court or a vacancy in any intermediate appellate court, and by the judicial district nominating commission for a vacancy in any other court in that district. In case of more than one vacancy in any such court, the list shall contain not less than two more nominees than there are vacancies to be filled. The list shall be submitted by the nominating commission not later than thirty days after the death, retirement, tender of resignation, removal under section 23, failure of an incumbent to file a declaration under section 25, or certification of a negative majority vote on the question of retention in office under section 25 hereof. If the governor shall fail to make the appointment (or all of the appointments in case of multiple vacancies) from such list within fifteen days from the day it is submitted to him, the appointment (or the remaining appointments in case of multiple vacancies) shall be made by the chief justice of the supreme court from the same list within the next fifteen days. A justice or judge appointed under the provisions of this section shall hold office for a provisional term of two years and then until the second Tuesday in January

following the next general election. A nominee shall be under the age of seventy-two years at the time his name is submitted to the governor.

(2) Repealed.

(3) Other vacancies occurring in judicial offices shall be filled as now or hereafter provided by law.

(4) Vacancies occurring in the office of district attorney shall be filled by appointment of the governor. District attorneys appointed under the provisions of this section shall hold office until the next general election and until their successors elected thereat shall be duly qualified. Such successors shall be elected for the remainder of the unexpired term In which the vacancy was created.

Article VI, Judicial Department

§ 25. Election of justices and judges

A justice of the supreme court or a judge of any other court of record, who shall desire to retain his judicial office for another term after the expiration of his then term of office shall file with the secretary of state, not more than six months nor less than three months prior to the general election next prior to the expiration of his then term of office, a declaration of his intent to run for another term. Failure to file such a declaration within the time specified shall create a vacancy in that office at the end of his then term of office. Upon the filing of such a declaration, a

question shall be placed on the appropriate ballot at such general election, as follows:

"Shall Justice (Judge). . . . of the Supreme (or other) Court be retained in office? YES/. . . . /NO/. . . . /." If a majority of those voting on the question vote "Yes", the justice or judge is thereupon elected to a succeeding full term. If a majority of those voting on the question vote "No", this will cause a vacancy to exist in that office at the end of his then present term of office.

In the case of a justice of the supreme court or any intermediate appellate court, the electors of the state at large; in the case of a judge of a district court, the electors of that judicial district; and in the case of a judge of the county court or other court of record, the electors of that county; shall vote on the question of retention in office of the justice or judge.

CONSTITUTION OF UNITED STATES

Current through 2010

Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immuities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article III. JUDICIAL DEPARTMENT

§ 1. Judicial Power, Courts, Judges

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

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§ 2. Judicial Power and Jurisdiction

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue, 3rd Floor Denver, CO 80203	
Office of Administrative Courts 633 17th Street, Suite 1300 Denver, Colorado 80202 The Honorable Laura A. Broniak W.C. No. 4-648-693	FILED IN THE COURT of APPEALS STATE OF COLORADO MAR 13 2009 Clerk, Court of Appeals ▲ COURT USE ONLY ▲
Appellant/Claimant PATRICK YOUNGS v. Appellee/Respondent: WHITE MOVING & STORAGE and PINNACOL ASSURANCE	
Attorney for Appellant: Chris Forsyth Chris Forsyth Law Office, LLC 1675 Broadway Suite 1400 Denver, Co 80202 Telephone: 303-892-3894 Facsimile: 303-892-3892 Atty. Reg.#: 22608	Case Number: 08CA2209 Div.: Ctrm.:

MOTION FOR DISQUALIFICATION OF JUDGES PURSUANT TO C.R.C.P. RULE 97

COMES NOW the Appellant, Patrick Youngs, by and through his attorney, Chris Forsyth, Esq., and respectfully submits this Motion for Disqualification of Judges Pursuant to C.R.C.P. Rule 97 as follows:

1. This is a workers' compensation case. It was appealed from the administrative law judge (ALJ) to the Industrial Claim Appeals Panel. The Panel ordered that the errors made by the ALJ were harmless. A Notice of Appeal was timely filed.

2. The issues endorsed for appeal include whether the jurisdiction of the Office of Administrative Courts over workers compensation cases is constitutional. Youngs alleges that the Colorado Constitution requires that judges who hear workers' compensation cases in the judicial branch

3. The issue of whether judges who hear workers' compensation cases should be in the judicial branch has come before the judicial branch on previous occasions in different venues.

4. This motion is to request that the judicial branch recuse on the basis of partiality, bias and predisposition pursuant to C.R.C.P. Rule 97.

5. The judicial branch has stated its clear bias against having judges who hear workers' compensation cases. The judicial branch has gone to great lengths to keep judges who hear workers' compensation cases out of the judicial branch.

6. Attachments to this motion show multiple acts of the judicial branch evidencing bias and predisposition on the issue of whether workers' compensation judges should be in the judicial branch. The acts include:

   - Going on the legislative record in 1996 as opposed to the idea of workers' compensation judges being in the judicial branch,
   - Regularly opposing attempts by the legislative and executive branches to have workers' compensation judges in the judicial branch, and
   - Stacking a Court of Appeals' panel with judges to ensure the opinion is in the judicial branch's favor.

7. Canon 3 of the Code of Judicial Conduct mandates disqualification in this matter.

8. Due to the fact that the judicial branch has acted as a whole and voiced its animosity toward having workers' compensation judges in the judicial branch, the entire judicial branch is subject to disqualification.

9. According to the Clerk of the Court of Appeals, the names of the judges on the panel who will hear this case have not yet been determined. The clerk has advised that the panel will be selected after the briefs are submitted.

10. Canon 3 of the Code of Judicial Conduct contains a rule of necessity. Where disqualifications exist as to all or a majority of the members of the court, the rule of necessity requires that the matter be

heard as opposed to denying the party access to courts.

11. The rule of necessity will require someone in the judicial branch to hear this case. The rule of necessity does not require, however, that any judge in the judicial branch can hear this case.

12. Although the judicial branch has acted as a whole with its desire to keep workers' compensation judges outside of the judicial branch, some judges have been more active and vocal than others.

13. The attached affidavit shows that Janice Davidson, Chief Judge of the Colorado Court of Appeals, and Mary Mullarkey, Chief Judge of the Colorado Supreme Court, have acted with particular malice toward the issue of workers' compensation judges being in the judicial branch. The attached affidavit shows the judiciary as a whole is partial on the issue of ALJs in the judicial branch. Although the rule of necessity requires the judicial branch to hear the case, it does not necessitate Mullarkey's and Davidson's involvement in this case and they should have no involvement with this case.

14. The Court of Appeals should issue an order stating that grounds for disqualification have been shown, but that the rule of necessity requires the judicial branch to hear the case. The order should state that neither Mary Mullarkey nor Janice Davidson will be able to have any involvement in the case. In other words, they cannot hear or decide any issue on this case

including determining the judges who will hear the case.

15. The Court of Appeals should make the selection of judges and the drafting of an opinion in this case transparent in an attempt to alleviate the appearance of impropriety. The Court should state the names of the judges on the panel who will hear the case and provide the parties time to submit further objection to the judges if necessary. The order should also describe the process by which the judges were selected to be on the panel to hear this case.

16. In support of this motion the affidavit of undersigned counsel is attached. Youngs has also requested an evidentiary hearing in this matter. In that evidentiary hearing, Youngs intends to submit the transcripts of HB96-1299 and the testimony of Paul Farley on HB 01-1175 which show the well-known bias of the judiciary on the issue of ALJs in the judicial branch.

17. The judiciary has placed itself in a position where its partiality is clear and unequivocal. Although the rule of necessity requires a judge to hear this case, the judicial branch should do everything in its power to reduce the partiality.

WHEREFORE, Youngs requests that an order issue stating that the grounds for disqualification are clear but that the rule of necessity requires that a panel of judges hear this case. The order should set forth that Mary Mullarkey and Janice Davidson are not to decide any issue regarding this case. The order should further set forth the names of the judges who

will hear the case and explain how those judges were selected. The order should create a transparent process wherein the judicial branch will attempt to reduce the appearance of impropriety in this matter.

Respectfully submitted this 13th day of March, 2009, by:

CHRIS FORSYTH
LAW OFFICE, LLC

/s/ Chris Forsyth
Chris Forsyth, #22608
1675 Broadway
Suite 1400
Denver, CO 801202

COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue, 3rd Floor Denver, CO 80203	
Office of Administrative Courts 633 17th Street, Suite 1300 Denver, Colorado 80202 The Honorable Laura A. Broniak W.C. No. 4-648-693	▲ COURT USE ONLY ▲
Appellant/Claimant PATRICK YOUNGS v. Appellee/Respondent: WHITE MOVING & STORAGE and PINNACOL ASSURANCE	
Attorney for Appellant: Chris Forsyth Chris Forsyth Law Office, LLC 1675 Broadway Suite 1400 Denver, Co 80202 Telephone: 303-892-3894 Facsimile: 303-892-3892 Atty. Reg.#: 22608	Case Number: 08CA2209 Div.: Ctrm.:
AFFIDAVIT OF CHRIS FORSYTH, ESQ. SUPPORTING JUDICIAL DISQUALIFICATION	

I am an attorney and I am over the age of 18 years.

One issue in the above-captioned case is whether judges who hear and decide workers' compensation cases are required by the Colorado Constitution to be in the judicial branch. Judges in the judicial branch have shown partiality on the issue of whether judges who hear and decide workers' compensation claims should be in the judicial branch. Based on the actions of the judicial branch as a whole and the actions of particular judges, the judicial branch must disqualify itself from hearing the above-captioned case.

1996 House Bill 1299: Judicial Branch states, "We don't want the work."

In 1996, a bill was introduced in the legislature that would do the same thing that appellant is asking in the above-captioned case: Place the judges who hear and decide workers' compensation claims in the judicial branch. Representative Vickie Agler introduced HB 1299 which would have placed ALJs in the judicial branch and made them accountable through the selection and retention process.

At a hearing regarding HB 1299, a representative for the judicial branch as a whole testified. A certified transcript from the hearing regarding the bill has been provided along with the Motion for Disqualification of Judges. On March 12, 1996, Kim Morss with the Judicial Department testified. Morss testified against the bill. Specifically, Morss said of

the Judicial Department, "we don't want the work." March 12, 1996, Tr. of HB96-1299, p. 41, ln. 19-20. Just before Morss testified, she states she had just spoken with the chief justice.

It must also be noted that in her testimony Morss admitted that the Judicial Department recommended the changes in the bill that eventually led to a fiscal note. Agler's original draft of the bill would have just had the judicial department essentially taking over the Division of Administrative Hearings. In other words, Agler's original bill would not have cost the state any more money than the system in place at that time. The Judicial Department, however recommended changes that created a fiscal note.

Although HB 1299 passed out of committee, the bill was killed in appropriations due to the fiscal note that was caused by changes recommended by the Judicial Branch. The judicial branch knew that if it lost in committee on the basis of the idea, it could prevail if it structured the bill so it would have a fiscal note. The judicial branch's sabotage of HB 1299 worked. The transcript from the proceedings regarding HB96-1299 show that the judicial branch is not impartial on the issue of workers' compensation judges in the judicial branch. Indeed, the transcript from HB96-1299 shows that the judicial branch will do whatever it needs to do to keep workers' compensation judges out of the judicial branch. Based on this testimony alone, it is clear that the judicial branch is not impartial on the issue of workers' compensation judges in the judicial branch.

2001: Judicial Branch Continues to Resist ALJs in the Judicial Branch.

In 2001, problems in workers' compensation proceedings and other matters were studied as part of the Governor's Task Force on Civil Justice Reform. Solutions were discussed and HB 1175 was proposed. The bill did not propose moving ALJS to the judicial branch, but did propose a different agency in the executive branch. At two committee hearings, the Director of the Division of Administrative Hearings, Paul Farley, made comments regarding why ALJs were not in the judical branch.

The certified transcripts of Farley's testimony have been provided with the Motion for Disqualification of Judges. On February 1, 2001, Farley testified that, "I know the judicial branch has been offered the administrative hearings' function a number of times over the years and they've resisted that." February 1, 2001, Tr. of HB01-1175, p. 29, ln. 15-17. Farley testified again on March 7, 2001, and it was clear from his testimony that he knew that the judicial branch did not want ALJs in its branch. *See* March 7, 2001, Tr. of HB01-1175, p. 11, ln. 16-19.

Once again, the knowledge of partiality of the judicial branch on the issue of workers' compensation judges in the judicial branch was placed on the record. Based on this testimony alone, it is clear that the judicial branch is not impartial on the issue of workers' compensation judges in the judicial branch.

Chief Justice Mary Mullarkey doesn't want ALJs in the judicial branch.

On January 28, 2004, undersigned counsel spoke with Representative Tambor Williams about sponsoring a bill to put ALJs in the judicial branch. Williams told Forsyth that she and the governor (undersigned counsel believed this to be Bill Owens) had previously spoken with Chief Justice Mary Mullarkey. Williams said Mullarkey was against ALJs in the judicial branch, and that Mullarkey said she couldn't make it (ALJs) work (in the judicial branch).

No bias disclosed before ruling on certiorari issue.

On March 14, 2002, the Court of Appeals issued its opinion in the case of *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002) (02SC373). On June 7, 2002, a petition for certiorari was filed in the *MGM* case.

On October 7, 2002, Supreme Court Justice Nathan B. Coats – in an official capacity – officiated at the swearing in (investiture) of an ALJ (Jamie Klein). As Chief Justice, it is highly probably that Mullarkey was responsible for the appearance. At a minimum, it appears that Mullarkey – and all judges on the Colorado Supreme Court – placed their stamp of approval on the ALJ system with Coats' appearance. The action was a blatant admission of the judicial branch's bias on the ALJ issue – while a case

challenging the ALJ system was pending certiorari with the Court.

On January 27, 2003, Colorado Supreme Court Justice Mary Mullarkey, along with the rest of the supreme court, denied certiorari in the *MGM* case. Neither Mullarkey nor any other judge ever revealed the judicial branch's ongoing bias and political activism against ALJs in the judicial branch. Undersigned counsel was not aware of the facts in this affidavit until he looked further into the issue at a later point in time.

Court of Appeals Panel is stacked.

The case of *Dee Enterprises v. Indus. Claim Appeals Office*, 89 P.3d 430 (Colo. App. 2003) was determined by the Court of Appeals. Constitutional and jurisdictional arguments were listed in the issues for appeal. The opening brief was filed on February 10, 2003. A panel of judges was assigned to the case. Judge Taubman was one of the judges on the panel.

Before oral argument in the *Dee Enterprises* case, however, the panel of judges changed. Judges Hume, Sternberg and Davidson were assigned to the case. Davidson was the chief judge of the Court of Appeals at the time. Sternberg and Hume were retired at the time, and pursuant to statute they could only be assigned by Supreme Court Chief Justice Mary Mullarkey. Colo. Rev. Stat. § 13-4-104.5.

Not only were Sternberg and Hume retired, they were both former chief judges of the Court of Appeals. In other words, the case was taken from the hands of the original panel and placed in the hands of the panel constructed by Supreme Court Chief Justice Mary Mullarkey. The new panel consisted of two former chief judges and the current chief judge of the Court of Appeals. This is important because the chief judge of the Court of Appeals is an administrative aide for the chief justice of the Supreme Court. Colo. Rev. Stat. § 13-4-105 reads as follows:

> The chief justice of the supreme court shall appoint a judge of the court of appeals to serve as chief judge at the pleasure of the chief justice. The chief judge shall exercise such administrative powers as may be delegated to him by the chief justice.

In other words, the *Dee Enterprises* panel was stacked with judges who worked closely with the chief justice and were familiar with the chief justice's desires. This was not an independent panel by any stretch of the imagination. What did the chief justice tell her current chief judge? Did Mullarkey tell Davidson that if it was found that workers' compensation cases must be heard in the judicial branch that Davidson would have to administrate the court? Were Sternberg and Hume along for the ride to fulfill the wishes of their former boss who they worked closely with for years?

On July 31, 2004, the Court of Appeals issued a written opinion in the *Dee Enterprises* case. It must

be noted that the rationale for the opinion was not argued by the opposing side in the case. The rationale was based on issues raised by the court. Once enunciated, the court never allowed a meaningful opportunity for the rationale to be challenged. Furthermore, at this point the judicial branch had still not revealed its disdain for having workers' compensation judges in the judicial branch. Indeed, the judicial branch once again did everything it could to avoid having workers' compensation judges a part of the judicial branch.

Former supreme court justice admits bias of the judicial branch.

The claimant in the *Dee Enterprises* case sued the insurance company for bad faith based on the arguments in the appeal. Former supreme court justice Jean E. Dubofsky was hired as plaintiff's expert in the case. In her report, Dubofsky glossed over the merits of the case and got to the heart of the matter. "To rule that all hearings on benefits under workers' compensation would have to be in courts would increase the workload of the courts, something that an appellate court is not going to do. I believe that Mid-Century's constitutional challenges to the workers' compensation structure had less than a one percent chance of success."

In other words, the former supreme court justice admitted that the Court of Appeals would rule against the argument that workers' compensation

judges should be in the judicial branch – not based on the merit of the argument, but because the judicial branch didn't want the work. The Dubofsky report is an admission of bias from a former supreme court justice.

And it may be interesting to note that the people mentioned in this affidavit – Farley, Dubofsky and Williams – are currently members of the state Judicial Performance Commission.

Judicial complaint is swept under the rug.

Based on the above, undersigned counsel filed a complaint with the Judicial Discipline Commission on May 7, 2004. Pursuant to law, undersigned counsel cannot disclose the documents from the complaint. But suffice it to say that the complaint was not even investigated, despite the fact that many judicial canons were violated. *See* Judicial Canons 7, 4, 3, 2, 1 and Rule 5(a)(1) of the Colorado rules of Judicial Discipline.

The judicial discipline commission essentially works for the Supreme Court. *See* Rule 3 of the Colorado Rules of Judicial Discipline. Although the committee does not perform any judicial function, the committee answers to the Supreme Court. One doesn't have to be that bright to see the conflict that arises when a complaint is filed regarding the judges who oversee the commission. The Supreme Court is policing itself. Undersigned counsel was contacted by the Judicial Discipline Commission and told that the

complaint would not be investigated. Although it supposedly was not investigated, the attorney for the commission told undersigned counsel that he had spoken with the chief justice and that the "we don't want the work" comment was made when another judge was chief justice. The attorney for the commission stated that the rule of necessity required the judges to rule. But this is incorrect because at least Mullarkey and Coates could have recused themselves based on their actions. Furthermore, they should have revealed the bias beforehand. The complaint regarding the judges should have been referred to independent counsel. It was not. The chief justice ensured the complaint would not be investigated. And pursuant to Rule 9 of the Colorado Rules of Judicial Discipline the Supreme Court Chief Justice should have recused herself. By admitting he talked with Mullarkey, the attorney for the commission brought into great question the validity of its finding and the integrity of the judiciary.

The rule of necessity does not allow just any judge to hear this case.

The partiality of the judicial branch on the issue of workers' compensation judges in the judicial branch is clear and unequivocal. The judicial branch does not want to have judges who hear and decide workers' compensation cases included within the branch. Youngs is arguing in this case that the Colorado Constitution requires that judges who hear and decide workers' compensation cases be a part of the

judicial branch, subject to selection and retention. Therefore, there is a clear partiality against the argument Youngs is making. And that partiality is not based on any law or case; The partiality is based on the judicial branch's desire. The judicial branch doesn't "want the work."

The rule of necessity is contained in Canon 3 of the Code of Judicial Conduct. Youngs must have access to the court. The judicial branch spoke as a whole when it said "we don't want the work." Pursuant to the judicial canons, undersigned counsel does not believe such statement was appropriate by the judicial branch, but nevertheless the statement was made. And the utterance of the statement showed the partiality of the entire judicial branch.

There are many judges at the Court of Appeals, however, who would be better to hear this case than others. Obviously Chief Judge Janice Davidson should not be on the panel. Also obvious is that Supreme Court Chief Justice Mary Mullarkey should have nothing to do with the selection of a panel. Any of the judges who were involved with the prior opinions are suspect. In other words, the Court of Appeals has the power to at least attempt to reduce the partiality of a panel hearing the case. It is important to note, however, that the partiality of the judiciary on this issue cannot be erased. Aviado requests that a panel be selected pursuant to the rule of necessity and the parties informed of the names on the panel as soon as it is selected.

Conclusion

The fact that I have to submit the Motion for Disqualification of Judges in this matter is disturbing. I should not have to make such motion. The judges should not have done what they did. A client of mine summed it up best when she reacted to the facts of this matter. Without waiving any attorney-client privilege, my client told me, "I didn't think they did those things in America. I thought they only did things like that back home." That client was from the Philippines.

Furthermore, the irony of this whole issue is not lost on me. After all, one has to question why someone would want a judge in the judicial branch when the judges in the judicial branch proceed with such clear partiality. We're having to ask judges in the judicial branch to recuse while we're making the substantive argument that workers' compensation hearings must be heard by judicial branch judges. Maybe the executive branch does have better judges than the judicial branch. But by placing the judges in the executive branch, the selection and retention provisions of the Colorado Constitution are lost. The selection and retention provisions are to ensure the quality of the judiciary. The judges go through a selection process with the hope that the process will ensure a judge has sufficient qualities to be a good judge. Once a judge is appointed, if he or she is doing a bad job, the people can vote him or her off of the bench. No such rights apply to executive branch judges.

As an attorney, I am sworn to uphold the Colorado Constitution, I am sworn to seek the improvement of justice, and I am to be an advocate for my client. All of these things require me to file the Motion for Disqualification of Judges and this affidavit with the motion. The judicial branch is clearly partial on the issues to be litigated in this appeal.

Based on the actions of the judiciary, an impartial panel cannot be found to determine the issues in this appeal. It is my opinion, based on the facts set forth above, that a fair and impartial hearing cannot be had in the judicial branch on the issue of whether workers' compensation judges should be in the judicial branch. It is my opinion that the judicial branch has shown clear bias that is based on its pure desire as opposed to any legal argument. Any opinion that keeps workers' compensation judges out of the judicial branch will be suspect. Nevertheless, Youngs must have access to the courts. It is respectfully requested that the Court of Appeals acknowledge that grounds for disqualification exist and that the rule of necessity must be invoked it this matter. It is respectfully requested that the Court of Appeals do whatever it can to decrease the partiality of any panel selected in this matter.

Dated this 13th day March, 2009, by:

/s/ Chris Forsyth
Chris Forsyth, Reg. No. 22608

STATE OF COLORADO)
) ss.
COUNTY OF DENVER)

Subscribed and sworn to before me this 13th day of March, 2009, by Chris Forsyth.

My commission expires:

4/11/2012

/s/ Mary E. Livesay
Notary Public
Address: _____
_____

[SEAL]

CERTIFICATE OF SERVICE

I herby certify that on this 13th day of March, 2009, I served a true and correct copy of the foregoing Motion for Disqualification of Judges, including appendices via United States Mail, first-class, postage-prepaid and addressed, as follows:

Via hand-delivery
Court of Appeals
State of Colorado
2 East 14th Avenue, 3rd Floor
Denver, CO 80203

Via United States Mail

Industrial Claim Appeals Office
633 17th St., Suite 600
Denver, CO 80202-3660

Laurie Rottersman
Attorney General's Office
1525 Sherman St.
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Pinnacol Assurance
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7501 E. Lowry Blvd.
Denver, CO 80230

/s/ Chris Forsyth